No. 00-1187-CFX Title: David R. McKune, Warden, et al., Petitioners
v.
Robert G. Lile

Docketed: January 23, 2001 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Jan 22 2001	Petition for writ of certiorari filed. (Response due February 22, 2001)
	Feb 7 2001	Waiver of right of respondent Robert G. Lile to respond filed.
	Feb 14 2001	DISTRIBUTED for Conference of March 2, 2001
	Feb 26 2001	Response requested.
	Mar 26 2001	Brief of respondent Robert G. Lile in opposition filed.
	Apr 11 2001	REDISTRIBUTED for Conference of April 27, 2001
	Apr 13 2001	Letter from counsel for the State received and distributed.
	May 7 2001	REDISTRIBUTED for Conference of May 10, 2001
	May 14 2001	Petition GRANTED. SET FOR ARGUMENT November 28, 2001. **********
	Jun 4 2001	Order extending time to file the joint appendix and petitioners' brief on the merits to and including July 12, 2001.
	Jul 11 2001	Joint appendix filed.
	Jul 12 2001	Brief of petitioners David R. McKune, Warden, et al. filed.
	Jul 12 2001	Brief amicus curiae of United States filed.
	Jul 12 2001	Brief amicus curiae of Ohio, et al. filed.
	Aug 8 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 13 2001	Brief of respondent Robert G. Lile filed.
	Sep 12 2001	Reply brief of petitioners Davfid McKune, Warden, et al. filed.
	Sep 24 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Sep 25 2001	CIRCULATED.
	Oct 1 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 25 2001	Record filed.
	Nov 28 2001	ARGUED.
	Nov 28 2001	Record filed.

Supreme Court, U.S.
FILED

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OFFICE

No. 00-

IN THE
Supreme Court of the United States

DAVID R. MCKUNE, Warden
and CHARLES SIMMONS, Secretary,
Kansas Department of Corrections,
Petitioners,

v.

ROBERT G. LILE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the revocation of correctional institution privileges violates the Fifth Amendment's privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate's failure to accept responsibility for his crimes as part of a sex offender treatment program?

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OPINIONS BELOW

The September 5, 2000, decision of the United States Court of Appeals for the Tenth Circuit is reported at 224 F.3d 1175, and is included in the petition appendix. The decision of the District Court is reported at 24 F. Supp. 2d 1152, and is also included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision in this case on September 5, 2000, and denied a timely petition for rehearing and suggestion for rehearing en banc on October 24, 2000. This petition has been filed within ninety days of the latter date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part that

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

U.S. Const. amend V.

Kansas Department of Corrections Internal Management Policy and Procedure 11-101 provides that

> "An inmate shall remain on Level III provided he . . . shall be automatically reduced to Level I for . . . [d]ocumented refusal to participate in work assignments or recommended programs . . . ."

STATEMENT

1. *Nature of the Suit.* The Kansas Department of Corrections (KDOC) employs a comprehensive system of earnable inmate privileges in order to manage the offender

population and reinforce constructive behavioral changes. As part of this system, inmates work their way through privilege incentive levels in accordance with their behavior, at all times subject to reduction for disciplinary, work or recommended program infractions. Inmate Lile, a convicted sex offender[1], filed this suit after he was reduced to Level I (from Level III) for refusing to participate in his recommended treatment program, the Sexual Abuse Treatment Program (SATP), because it required him to accept responsibility for his sex crimes. Inmate Lile claims his privilege reduction to Level I for refusing to accept responsibility in sex offender treatment violates his Fifth Amendment privilege against self-incrimination.

2. *The District Court*. The District Court initially granted a temporary injunction to inmate Lile, precluding the KDOC from reducing his privilege incentive level and keeping him on the SATP waiting list. The District Court ultimately granted summary judgment to inmate Lile on his Fifth Amendment claim.[2] Petition Appendix ("Pet. App.") 37a-46a. Also, the District Court ordered the injunction continued until appellate review is completed. *Id.* at 54a-55a.

3. *The Tenth Circuit*. The Tenth Circuit affirmed the District Court. Pet. App. 3a-32a. The Tenth Circuit began its Fifth Amendment analysis by briefly addressing the incrimination component of the privilege. *Id.* at 6a-7a. The Sexual Abuse Treatment Program requires participating

[1] Robert G. Lile was convicted of aggravated kidnapping, rape, and aggravated sodomy in 1983 for forcibly raping a high school student after threatening her with a gun. *Lile v. McKune*, 45 F. Supp. 2d 1157, 1159 (D. Kan. 1999) (denying writ of habeas corpus); *see also State v. Lile*, 237 Kan. 210, 699 P.2d 456 (1985).

[2] In addition to his Fifth Amendment claim, inmate Lile raised a privacy claim maintaining that he had a constitutional right to refuse penile plethysmograph testing.

inmates to complete a written sexual history and to sign an Acceptance of Responsibility form. Inmates are not given immunity from prosecution for any of their disclosures. The Tenth Circuit found that the incrimination element of the Fifth Amendment privilege was satisfied here for two reasons. First, the written sexual history might require persons such as inmate Lile to reveal uncharged sexual offenses. *Id.* at 6a-7a. Second, completion of the Acceptance of Responsibility form could subject inmates such as Lile to perjury charges for having maintained their innocence at trial. *Id.* at 7a.

The Tenth Circuit then addressed the compulsion element of the privilege. The court began with an examination of the adverse consequences to an inmate for refusing to accept responsibility or provide a written sexual history. Observing that inmate Lile faced transfer to maximum security (from medium security) if he failed to comply with the SATP requirements, the court noted that such a "transfer would restrict [inmate Lile's] privileges." Pet. App. 10a.

> Specifically, he [inmate Lile] would lose his personal TV; he would have limited access to prison organizations and activities and would be unable to participate in the IMPP [the prison's Internal Management Policies and Procedures programs]; he would have limited access to the gym and yard area; there would be a substantial reduction in the amount of money he could spend in the canteen per pay period, from $140 per payroll . . . to $20 per payroll . . .; he would receive a reduction in pay and intake property; and he would have substantially restricted visitation privileges.

Id.

The Tenth Circuit, however, concluded that Lile would not be denied parole nor lose any good time credits because he refused to participate in the SATP. Pet. App. 10a-12a. The Tenth Circuit thus concluded that the only adverse

consequences inmate Lile would suffer for refusing to participate in the SATP would be "transfer to maximum security prison and the resulting loss of privileges." *Id.* at 12a. According to the court, "[t]he critical question, then, is whether the State's imposition of these consequences in response to [inmate Lile's] invocation of his Fifth Amendment right against self-incrimination constitutes impermissible compulsion." *Id.* at 12a-13a.

In resolving the compulsion issue, the Tenth Circuit opined that "[t]here is no single test or factor that is dispositive, so we begin by examining Defendants' arguments." Pet. App. 13a. The court first addressed the argument that there is no compulsion here because inmate Lile's loss of privileges implicates no protected liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995). Although recognizing that changes in an inmate's prison classification ordinarily do not deprive him of a liberty interest, the Tenth Circuit opined that "nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur." Pet. App. 14a. Rather, the court held that "[c]ompulsion can be established by hardships that may not be atypical and that do not constitute enforceable liberty interests." *Id.* at 15a; *see also id.* at 17a ("It is clear that the compulsion element of a Fifth Amendment claim can be established by penalties which do not constitute a deprivation of protected liberty interests under the due process clause").

The Tenth Circuit then asserted that the "next critical question is whether the consequences imposed constitute penalties that are sufficiently potent and substantial to implicate the Fifth Amendment." Pet. App. 17a. Reviewing again the changes in privileges that would accompany a move from maximum to medium security (including loss of a personal TV, *see* Pet. App. 17a), the Tenth Circuit concluded that "these

deprivations and changes in environment are penalties sufficient to implicate the Fifth Amendment because they have substantial or potent effects on the inmate." *Id.* at 18a. In reaching that conclusion, the court emphasized that a critical factor is that refusal to participate in the SATP, "standing alone," results in the loss of privileges. *Id.* at 19a.

The Tenth Circuit next considered the argument that there is no compulsion because participation in the SATP is voluntary and changing inmate Lile's privileges when he refused to participate is the *withholding of a privilege* rather than the imposition of punishment. The court opined that the fact that the change in privileges in this case automatically followed refusal to participate in the SATP undermined the argument that participation "is truly voluntary." Pet. App. 20a. In supporting that conclusion, the Tenth Circuit distinguished *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (inmate invoked privilege in clemency proceeding), and *Minnesota v. Murphy*, 465 U.S. 420 (1984) (person on probation claimed privilege)—both of which found no Fifth Amendment violation or compulsion—as cases in which the person was not "punished or penalized *solely* for choosing to remain silent." Pet. App. 22a.

The Tenth Circuit then turned to "[t]wo additional considerations" that it opined might be helpful in determining what constitutes compulsion. Pet. App. 23a. "The first is a distinction between a privilege and a penalty." *Id.* Acknowledging that such a distinction exists and that it may have constitutional significance in this context, the Tenth Circuit nonetheless concluded that inmate Lile's loss of privileges in this case is "properly characterized as imposing penalties." *Id.* at 24a.

The Tenth Circuit also considered "the automaticity of the penalty." Pet. App. 25a. Again, the court opined that Supreme Court decisions finding no compulsion in the context of probation, parole or clemency, all involved situations in

which adverse consequences for remaining silent were not "automatic." *Id.* at 25a. Thus, the court concluded that "the State has violated [inmate Lile's] Fifth Amendment right against self-incrimination." *Id.* at 26a.

Lastly, having found a constitutional violation, the Tenth Circuit applied the balancing test of *Turner v. Safley*, 482 U.S. 78 (1987), which requires an assessment of "whether the prison policy at issue 'is reasonably related to legitimate penological interests.'" Pet. App. 27a (quoting *Turner*). The Tenth Circuit recognized that the state has legitimate interests in the public safety and rehabilitating sex offenders. *Id.* at 28a. The court also recognized that

> [t]here is a rational connection between the policy of having prisoners admit responsibility for their offenses and disclose their sexual history in order to participate in the SATP and the legitimate governmental interest in rehabilitation of sex offenders. In fact, most mental health experts agree that a "sex offender must admit his guilt for treatment and rehabilitation to be successful."

Id. at 28a (internal citations omitted).

Nonetheless, the Tenth Circuit concluded that the balancing of interests favors inmate Lile, because (1) "there is no evidence that [inmate Lile] has any alternative means of exercising his Fifth Amendment right," Pet. App. 29a, (2) "there is no evidence that accommodation of the right would have any negative effect on guards, other prisoners, or prison resources," *id.*, and (3) the alternative to the policy would be to grant immunity or privilege any statements disclosed by the inmate. *Id.* at 30a. Asserting that the state could still prosecute inmate Lile for other sex crimes—it just could not use any statements he made in the SATP—the Tenth Circuit concluded that "the *Turner* balancing easily weighs in favor of [inmate Lile]." *Id.* at 32a.

REASONS FOR GRANTING THE WRIT

The issue whether a State may withdraw privileges from a convicted sex offender for refusing to participate in a treatment program and accept responsibility for his crimes is one this Court decided to review previously, but the procedural posture of that earlier case ultimately prevented the Court from reaching the merits. *See Montana v. Imlay*, 506 U.S. 5 (1992) (dismissing the case because the offender would serve the same term of imprisonment regardless of the Court's resolution of the merits). Justice White, in his dissent from the dismissal, noted that:

> In the decision below, the Montana Supreme Court held that, "absent any grant of immunity" from prosecution for incriminating statements made during therapy, the Fifth Amendment "prohibit[s] augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." The constitutional question is an important one and the decision below places the Montana Supreme Court in conflict with other courts.

Imlay, 506 U.S. at 6.

The Court should take this opportunity to address the important constitutional question left unanswered in *Imlay*. The issue is cleanly presented in this case, there is no danger of mootness, the Tenth Circuit addresses the substantive issue at length in its opinion, and the Tenth Circuit's resolution of the issue is inconsistent with both this Court's and other courts' decisions. Indeed, this Court's decisions since it dismissed *Montana v. Imlay* almost ten years ago have strengthened the State's argument that the policy at issue here does not violate the Fifth Amendment.

Whether Unconstitutional Compulsion May Result From Prison Conditions That Are Not Atypical Is An Important Issue That Merits This Court's Attention.

A. The Tenth Circuit's Decision That Unconstitutional Compulsion May Result From Prison Conditions That Are Not Atypical Is Contrary To This Court's Recent Decisions.

In *Sandin v. Conner*, 515 U.S. 472 (1995), this Court recognized that "prisoners do not shed all constitutional rights at the prison gate, but '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* at 485 (internal citation omitted) (quoting *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)). Consequently, this Court held that prison officials could place a prisoner in disciplinary segregation for thirty days without providing procedural due process because such segregation did not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. In other words, when an inmate has no constitutionally protected right to, or liberty interest in, a particular housing level, his constitutional rights cannot be violated when that housing level is changed.

Reducing prison privileges—in which an inmate has no constitutionally protected liberty interest—for failing to accept responsibility in treatment is not compulsion under the Fifth Amendment. This Court has held that neither (1) the threat of a reduced opportunity for clemency, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), (2) the threat of revocation of parole, *Minnesota v. Murphy*, 465 U.S. 420 (1984), nor (3) the threat of adverse inferences being drawn at a prison disciplinary hearing, *Baxter v. Palmigiano*, 425 U.S. 308 (1976), constitute compulsion under the Fifth Amendment. Nonetheless, the Tenth Circuit held in this case that the threat

of a reduction in institutional privileges constitutes compulsion under the Fifth Amendment.

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), this Court held that a death row inmate could be forced to choose between incriminating himself or having adverse inferences drawn from his silence at his clemency interview. Despite the fact that "[i]n *Woodard*, plaintiff did not face a possible loss of privileges and benefits, but rather a possible loss of life," *Searcy v. Simmons*, 97 F. Supp. 2d 1055, 1059 (D. Kan. 2000), the Tenth Circuit distinguished *Woodard*, opining that "Mr. Woodard was not being punished for invoking the Fifth Amendment privilege." Pet. App. 20a-21a.

In *Minnesota v. Murphy*, 465 U.S. 420 (1984), this Court held that the Fifth Amendment was not violated when a parolee was questioned by his parole officer about prior criminal activity after having been told that failure to be truthful could result in revocation of parole. In *Lile*, the Tenth Circuit relied on a footnote in *Murphy* in which this Court opined that "a state may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding." *Id.* at 435 n.7. However, Justice White, author of *Murphy*, later declared that any "assumption that this Court's decision in *Minnesota v. Murphy* mandates . . . immunity from prosecution based upon incriminating statements made to a therapist . . . reflect a possible misunderstanding of [a State's] obligations under the law." *Montana v. Imlay*, 506 U.S. 5, 8 (1992) (White, J., dissenting from dismissal of writ of certiorari as improvidently granted). *Cf. McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[*Minnesota v. Murphy*] does not, however, overrule the Court's earlier cases that state that the government can penalize someone for refusing to cooperate on government matters, even when the person does so by invoking his privilege against self-incrimination") (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *Lefkowitz v. Turley*,

414 U.S. 70, 84 (1973); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976)).

Finally, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court held that negative inferences could be drawn from an inmate's silence in a prison disciplinary hearing without violating the Fifth Amendment, in part because "[d]isciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime." *Id.* at 319. The Tenth Circuit, however, distinguished *Baxter*, opining that "[h]ere, unlike in *Baxter*, Plaintiff's refusal to submit to the interrogation . . . standing alone, would certainly result in the [adverse consequences]." Pet. App. 19a. In *Baxter* the Court declared that

> [i]t is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In this respect, this case is very different from the circumstances before the Court in the Garrity-Lefkowitz decisions, where refusal to submit to interrogation and to waive Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State.

Baxter, at 317-18 (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967) (holding that police officers questioned concerning alleged fixing of traffic tickets in their boroughs could not be threatened with loss of employment for refusing to answer); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (holding that statute precluding award of government contract to any person refusing to answer questions concerning state contract violated the Fifth Amendment)).

The Tenth Circuit's analysis ignores the fact that it is not inmate Lile's silence alone but rather his conviction of a sexual

offense, plus the recommendation for treatment, plus his refusal to participate in that treatment which results in adverse consequences. Seen in this light, this case is much more similar to *Baxter* than to either *Garrity* or *Lefkowitz*. *See Asherman v. Meachum*, 957 F.2d 978, 982 (2nd Cir. 1992) ("The fact that a public employee might face the unpleasant choice of surrendering his silence or losing his job is no bar to an adverse consequence so long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right") (citing *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968)); *McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[P]rison officials may constitutionally deny benefits to a prisoner who, by invoking his privilege against self-incrimination, refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation and not his invocation of his privilege")).

B. The Tenth Circuit's Decision Conflicts With The Decisions Of Other Circuits And A Decision Of The Kansas Supreme Court.

The Tenth Circuit recognized that other courts would disagree with its *Sandin* analysis in this case, citing the following:

> *But cf. Tedder* [*v. Francke*], 1991 WL 65497, at *2 [(9th Cir. 1991)] (holding that Oregon sex offender program did not violate plaintiff's right against self-incrimination in part because he has no constitutional right to discretionary parole before the expiration of his sentence); *Guilkey v. Holden*, 865 F.2d 258, 1988 WL 134526 (6th Cir. 1988) (Table) (affirming district court determination that Fifth Amendment right against self-incrimination was not violated because plaintiff had no constitutionally protected liberty interest in discretionary parole).

Pet. App. 16a-17a. Indeed, the Tenth Circuit had to distinguish its own precedent in finding compulsion in this case: "To the extent that [our decision in] *Chambers* may be interpreted as a rule that compulsion can occur only where one is forced to forgo a constitutional right or a liberty interest, we are not bound to follow it here." Pet. App. 16a n.8 (citing *Chambers v. Bachicha*, 39 F.3d 1191 (unpublished table decision), 1994 WL 596702, at *3 (10th Cir. 1994) (finding it "dispositive of our inquiry that there is no compulsion for Fifth Amendment purposes . . . [because] Appellant has no right to earned time").

The Tenth Circuit's holding also conflicts with the Kansas Supreme Court's explicit conclusion that

> The housing assignment given to an inmate, his or her custody classification, granting of parole, spending limitations at a canteen, regulation of visiting hours, withholding of good time awards, and regulation of other daily activities which are not atypical and do not pose a significant hardship within a prison, do not involve a liberty interest or violate the defendant's Fifth Amendment right by compelling him to incriminate himself and participate in SATP.

Bankes v. Simmons, 265 Kan. 341, 351, 963 P.2d 412, 420 (1998). The Tenth Circuit's response to that decision is that "the liberty analysis should not be part of a Fifth Amendment privilege case." Pet. App. 17a n.9.

The Tenth Circuit's decision conflicts with the decisions of other Circuits and the Supreme Court of Kansas, and the constitutional question presented is an important one that warrants resolution by this Court.

C. The Tenth Circuit's Decision Provides This Court With An Opportunity To Consider Whether The *Turner v. Safley*, 482 U.S. 78 (1987), Balancing Test Applies In The Fifth Amendment Context.

In *Turner v. Safley*, 482 U.S. 78 (1987), the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. The Court then set out the following "factors that are relevant in determining the reasonableness of the regulation at issue": (1) whether there is a valid, rational connection between the prison regulation or practice and a legitimate governmental interest; (2) whether the regulation or practice allows inmates an alternative means of exercising the subject constitutional right; (3) the impact of accommodation of the asserted right on guards, other inmates, and the allocation of resources generally; and (4) the absence of ready alternatives to the regulation or practice. *Id.* at 89-91.

After finding a Fifth Amendment violation in this case, the Tenth Circuit applied the *Turner* balancing test and found that it "easily" weighed in favor of inmate Lile. Pet. App. 32a. However, it may be inappropriate to apply the *Turner* factors in the Fifth Amendment context. *Turner* involved claims under the First Amendment and the constitutional right to marry. Courts, including the Tenth Circuit itself, have recognized that application of the factors set forth in *Turner* to other constitutional claims may be inappropriate. *See, e.g., Dunn v. White*, 880 F.2d 1188, 1194 n.3 (10th Cir. 1989) ("The *Turner* test appears analytically to have only limited applicability to a prisoner's fourth amendment challenge"); *Michenfelder v. Sumner*, 860 F.2d 328, 331 (9th Cir. 1988) (noting that the second *Turner* factor is "much more meaningful in the first amendment context than the fourth, where the right is to be free from a particular wrong"); *see also Foote v. Spiegel*, 995 F. Supp. 1347, 1349 n.2 (D. Utah 1998) ("After careful

consideration, this court determines that the Supreme Court's decision in *Washington* only commands use of the *Turner* 'standard of review' (i.e. reasonableness instead of strict scrutiny) when assessing prisoners' or detainees' constitutional claims; it does not command the use of the *Turner* factors themselves") (citing *Washington v. Harper*, 494 U.S. 210 (1990)).

It does not appear that this Court has ever applied *Turner* to a case involving the Fifth Amendment. Thus, this case presents the Court with an opportunity to address whether, and if so how, the *Turner* balancing test and factors apply to inmates' Fifth Amendment claims.

D. The Extent To Which Correctional Institution Privileges May Be Used To Encourage Inmates To Participate In Sex Offender Treatment Programs Is An Important Question.

As noted above, the Court previously granted review in a case raising many of these issues in the related context of probation. At that time, one neutral *amicus* pointed out the importance of incentives for effective sex offender treatment:

> Denial is a common phenomenon in offender treatment. As treatment has become more sophisticated, methods for overcoming denial and encouraging honesty have been developed. Certain offenders continue to deny the abuse, however, despite the best efforts of therapists . . . . Efforts to provide meaningful offender treatment will be severely undermined unless offenders can be required to admit the abuse as a precondition to treatment, and unless failure to admit can lead to termination of treatment and revocation of probation or parole.

Brief of *Amicus Curiae* American Professional Society on the Abuse of Children Supporting Neither Party at 2, 8, *Montana v. Imlay*, 506 U.S. 5 (1992) (No. 91-687).

Prison administrators need a definitive answer to the question presented in this case, in order to determine how best to protect the public safety and to manage their growing sex offender populations. Treatment programs have proven effective, but they will be much less so absent strong incentives for inmates to participate. A decision in this case by this Court will affect potentially thousands of inmates and directly implicates the public safety.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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January, 2001

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT G. LILE, Plaintiff-Appellee/ Cross-Appellant, v. DAVID R. MCKUNE; CHARLES SIMMONS, Defendants-Appellants/ Cross Appellees.	Nos. 98-3292 & 98-3294

ORDER

Filed October 24, 2000

Before SEYMOUR, Chief Judge, McKAY, and EBEL, Circuit Judges.

Appellants/Cross-Appellees' petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Appellants/Cross-Appellees' reply received by this court on October 17, 2000, hereby refused as unauthorized by this court.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: [illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT G. LILE, Plaintiff-Appellee/ Cross-Appellant, v. DAVID R. MCKUNE; CHARLES SIMMONS, Defendants-Appellants/ Cross Appellees.	Nos. 98-3292 & 98-3294

Sept. 5, 2000

Before SEYMOUR, Chief Judge, McKAY and EBEL, Circuit Judges.

McKAY, Circuit Judge.

These cross-appeals arise out of an action brought by Plaintiff Robert G. Lile under 42 U.S.C. § 1983. Plaintiff is a prisoner at the Lansing Correctional Facility in Lansing, Kansas. On January 6, 1983, he was convicted in Kansas state court of aggravated kidnaping, rape, and aggravated sodomy.[1] He pleaded not guilty to these charges and testified at trial that

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[1] Kansas courts affirmed Plaintiff's convictions on direct appeal, *see State v. Lile*, 237 Kan. 210, 699 P.2d 456 (1985), and rejected his applications for postconviction relief. In March 1999, the United States District Court for the District of Kansas denied Plaintiff's 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See Lile v. McKune*, 45 F. Supp. 2d 1157 (D.Kan.1999).

he had consensual intercourse with the alleged victim. Though not part of his original sentence, the Kansas Department of Corrections recommended in 1994 that Plaintiff participate in the Sexual Abuse Treatment Program[2] [SATP or program] because he had been convicted of sex offenses and added it to his Inmate Program Agreement [IPA]. To be admitted into the program, Plaintiff was required to disclose his sexual history, including the crime of which he was convicted and any uncharged sexual offenses. He refused to make any such admissions and, on October 11, 1994, refused to sign his amended IPA.

After pursuing his administrative remedies without success, Plaintiff filed a § 1983 action against the State, naming the warden of the Lansing Correctional Facility and the Secretary of the Kansas Department of Corrections as defendants. He claimed first that the SATP and its corresponding regulations and policies violated his Fifth Amendment right against self-incrimination and second that the implementation of the SATP violated his Fourth Amendment right to privacy and bodily integrity. Specifically, he argued that Defendants' policy of withholding privileges and benefits penalized him for refusing to provide potentially incriminating information related to past sexual behavior or offenses and therefore violated his Fifth Amendment right against self-incrimination. He also complained that his Fourth Amendment rights were violated by the intrusive nature of the plethysmograph examination.

Ruling on cross-motions for summary judgment, the district court granted summary judgment to Plaintiff on his claim that the SATP violated his Fifth Amendment right against self-incrimination, but it granted summary judgment to

[2] In 1994, the treatment program was known as the Sex Offender Treatment Program or SOTP. Because the program is now called the SATP, we shall refer to it as such in this opinion.

Defendants on the Fourth Amendment claim. *See Lile v. McKune*, 24 F. Supp. 2d 1152 (D.Kan. 1998). We exercise jurisdiction under 28 U.S.C. § 1291.[3]

We review the denial or the grant of summary judgment de novo, applying the same legal standard used by the district court. *See Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). Summary judgment is properly granted where, viewing the factual record and the reasonable inferences therefrom in the light most favorable to the nonmoving party, "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Charter Canyon Treatment Ctr. v. Pool Co.*, 153 F.3d 1132, 1135 (10th Cir.1998).

I. Fifth Amendment

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. Although this language is somewhat narrow, the Supreme Court has interpreted it broadly. *See, e.g., In re Gault*, 387 U.S. 1, 50 (1967) (The privilege is to be "broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom."). The right not only applies to an individual's criminal trial but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973);

[3] This court has appellate jurisdiction over the district court's September 16, 1998 Order granting summary judgment to Plaintiff on his Fifth Amendment claim and granting summary judgment to Defendants on Plaintiff's Fourth Amendment privacy claim. According to the district court's subsequently filed December 29, 1998 Order, "no claim remains to be decided" and the September 16 Order was "intended as a final appealable order under 28 U.S.C. § 1291." App., Vol. 1 at 254.

see Minnesota v. Murphy, 465 U.S. 420, 426 (1984). The privilege has two components: incrimination and compulsion. Although it is not entirely clear whether Defendants assert that the SATP was not incriminating, we briefly address this issue.

A. Incrimination

The privilege guarantees every person the right to remain silent when faced with a real and appreciable risk of incrimination in a criminal proceeding. *See Minor v. United States*, 396 U.S. 87, 98 (1969). If the possibility of incrimination is too speculative or insubstantial, the privilege does not attach. *See id.*

In this case, the district court found that "the information required to be disclosed under the SATP ... is sufficiently incriminating for Fifth Amendment purposes." *Lile*, 24 F. Supp. 2d at 1157. We agree with the district court that "[b]y requiring the complete and written disclosure of a prisoner's sexual history, including all uncharged sexual offenses, SATP clearly [sought] information that could incriminate the prisoner and subject him to further criminal charges." *Id.* (footnote omitted). This is especially true in this case because no confidentiality is afforded such disclosures; an admission of any information concerning uncharged sexual offenses against minors must be turned over by the SATP staff to the proper authorities under Kansas law. *See* Supp.App. at 253; Kan. Stat. Ann. § 38-1522 (mandating reporting of abuse or neglect of children). In addition, all SATP files, including the sexual history form, are subject to disclosure by subpoena or other court order. *See* Supp.App. at 116-18, 253; 42 C.F.R. §§ 2.63(a)(2), 2.65 (authorizing disclosure of confidential communications and patient records for criminal investigation or prosecution of patient); *see also Lile*, 24 F. Supp. 2d at 1157 n. 7 (distinguishing *Chambers v. Bachicha*, 39 F.3d 1191, 1994 WL 596702 (10th Cir.1994) (Table), which found no Fifth Amendment violation in part because of confidentiality of prison records); *cf. Neal v.*

Shimoda, 131 F.3d 818, 833 & n. 18 (9th Cir. 1997) (rejecting Fifth Amendment self-incrimination claim because of absence of evidence of a real possibility that state would use admission to sex offenses against plaintiffs in future criminal proceeding and because "there [was] no danger that [an] ... inmate would be compelled to admit to other sexual misconduct of which prison or law enforcement officials were not already aware"); *Tedder v. Francke*, 931 F.2d 897, 1991 WL 65497 (9th Cir.1991) (Table) (holding that Oregon sex offender program did not violate plaintiff's right against self-incrimination in part because admissions made would be privileged under Oregon evidence rule). Plaintiff knew that any incriminating information he disclosed could be used to prosecute him. In fact, Defendants concede that inmates are "advised that information obtained during the course of treatment [in the SATP] has limited confidentiality" and will be given to law enforcement officials if prosecutable. Defendants' Third Br. at 3.

Additionally, an admission of culpability regarding the crime of which Plaintiff was convicted would put him at an appreciable risk for a perjury prosecution, especially because he testified at trial that he was not guilty. *See Thomas v. United States*, 368 F.2d 941, 945 (5th Cir. 1966); *State v. Cate*, 165 Vt. 404, 683 A.2d 1010, 1019 (1996). Having determined that the incrimination element of the Fifth Amendment privilege analysis is satisfied, we now turn to the more difficult issue of compulsion.

B. Compulsion

In *Lefkowitz v. Cunningham*, 431 U.S. 801, 807 (1977), the Supreme Court emphasized that "the touchstone of the Fifth Amendment is compulsion" and recognized that the imposition of penalties is the mechanism by which persons are compelled to incriminate themselves. *See id.* at 804-05; *Garner v. United States*, 424 U.S. 648, 653 (1976). The privilege provides an individual with the right "not to answer

official questions put to him in any ... proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Turley*, 414 U.S. at 77.

After finding that the disclosure of Plaintiff's sexual history required by the SATP was "sufficiently incriminating for Fifth Amendment purposes," *Lile*, 24 F. Supp. 2d at 1157, the district court determined that the SATP and its corresponding regulations and policies impose significant adverse consequences on Plaintiff and "operate[ ] to compel the disclosure of such incriminating testimony" in violation of the Fifth Amendment privilege. *Id.*

Defendants argue that the court "erred in concluding that the withholding of discretionary privileges from an inmate as a consequence of the inmate's refusal to participate in a rehabilitation program constituted compulsion within the meaning of the Fifth Amendment." Appellants' Br. at 7. They claim that no compulsion exists because Plaintiff's decision to participate or not participate in the SATP is voluntary and because Plaintiff has no protected liberty interest in any of the privileges that would be withheld.

In response, Plaintiff argues that by requiring him to complete an admission of responsibility form and disclose his sexual history, and by imposing adverse consequences for his failure to do so, the SATP unconstitutionally compels him to reveal potentially incriminating information about his sexual history and thus violates his Fifth Amendment right against self-incrimination.

Supreme Court jurisprudence concerning the Fifth Amendment right against self-incrimination instructs that, unless an individual is given immunity at the time of his potentially incriminating testimony, he may not be confronted with the dilemma of either answering questions that may incriminate him or being substantially penalized solely for the

assertion of his constitutional privilege. *See Garner*, 424 U.S. at 661 (indicating that where the assertion of the privilege is penalized it "foreclos[es] a free choice to remain silent[ ] and therefore ... compel[s] the incriminating testimony"). In other words, "a State may not impose substantial penalties because a [declarant] elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Cunningham*, 431 U.S. at 805; *see also Murphy*, 465 U.S. at 434. Resolution of the compulsion question in this case then turns on whether the consequences of Plaintiff's refusal to admit responsibility for his charged and uncharged sexual offenses constitute substantial penalties that are impermissibly coercive.

1. Adverse Consequences

In order to properly assess whether there has been a violation of the Fifth Amendment, it is essential to understand the precise nature of the adverse consequences that result from Plaintiff's refusal to sign an Admission of Responsibility form and disclose his sexual history. Plaintiff asserts that he would suffer the following consequences: Termination from the SATP and the resulting transfer out of a medium security facility into maximum security housing; loss of visitation, job, canteen, and prison programming privileges; denial of eligibility for parole; and denial of the opportunity to earn good-time credits.

The record reflects that Plaintiff would, in fact, be subject to a transfer out of medium security to maximum security for his refusal to participate in the SATP by refusing to admit responsibility.[4] According to the Kansas Department of

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[4] In an order filed April 23, 1996, the district court granted Plaintiff temporary injunctive relief directing Defendants to keep Plaintiff on the SATP waiting list and enjoining them from applying the privileges and incentives program to Plaintiff because of his refusal to admit responsibility for his offense and disclose his sexual history as required by the SATP.

Corrections' Internal Management Policies and Procedures [IMPP], Plaintiff's incentive level would be automatically reduced from Level III to Level I. *See* App., Vol. I at 23-24 (IMPP Rule 11-101). Practically, this means that the Department would automatically transfer Plaintiff from a medium security facility to maximum security housing. *See id.* at 24; Supp.App. at 285. This change in incentive level and transfer would restrict Plaintiff's privileges. Specifically, he would lose his personal TV; he would have limited access to prison organizations and activities and would be unable to participate in the IMPP; he would have limited access to the gym and yard area; there would be a substantial reduction in the amount of money he could spend in the canteen per pay period, from $140 per payroll at Level III to $20 per payroll at Level I; he would receive a reduction in pay and intake property; and he would have substantially restricted visitation privileges. *See* App. at 29.

Turning to Plaintiff's claim that he would be denied parole for his refusal to participate in the SATP, Plaintiff cites Kan. Stat. Ann. §§ 75-5210a and 22-3717.[5] Section 22-3717(g) provides:

> [T]he Kansas parole board may release on parole those persons confined in institutions who are eligible for parole when: ... (2) the secretary of corrections has reported to the board in writing that the inmate has satisfactorily completed the programs required by any agreement entered under K.S.A. § 75-5210a and amendments thereto, or any revision of such agreement.

[5] Though Plaintiff cites § 22-3717(k) in support of his claim that he will be denied eligibility for parole, that section appears to have no bearing on the issues in this case. Subsection (k) states, "Parolees and persons on post-release supervision shall be assigned, upon release to the appropriate level of supervision pursuant to the criteria established by the secretary of corrections." Kan. Stat. Ann. § 22-3717(k).

Section 75-5210a requires an inmate and the secretary of corrections to enter into a written agreement "specifying those educational, vocational, mental health or other programs which the secretary determines the inmate must satisfactorily complete in order to be prepared for release on parole or postrelease supervision."

According to the record, Plaintiff entered into a program agreement and promised to complete the Sexual Offender Treatment Program (the precursor to the SATP) on June 1, 1995. Although the language of §§ 75-5210a and 22-3717(g) suggests that Plaintiff is required to complete the SATP in order to be eligible for parole, this is not the case. In *Payne v. Kansas Parole Board*, 20 Kan. App. 2d 301, 887 P.2d 147, 150 (1994), the Kansas Court of Appeals held that §§ 75-5210a and 22-3717(g)(2), which became effective on March 1, 1995, do not apply retroactively. The *Payne* court noted that "[§] 75-5210a directs the Secretary of Corrections to enter into program agreements only with newly committed inmates" and that "successful completion of a program agreement was not a prerequisite for parole prior to the 1988 enactments." *Id.* Like the petitioner in *Payne*, Plaintiff's conviction in 1983 occurred long before these provisions were enacted. Thus, under *Payne*, Plaintiff is not required to enter into or complete a program agreement pursuant to §§ 75-5210a and 22-3717(g)(2) to be eligible for parole. *See id.*; *see also Johnston v. Simmons*, 45 F. Supp. 2d 1220, 1224 (D.Kan. 1999) (relying on *Payne* to hold that §§ 75-5210a and 22-3717 did not result in an ex post facto violation where plaintiff had been convicted prior to the effective date of these provisions because "plaintiff is not required to enter into a program agreement, nor is he required to complete any agreed programs as a condition of his parole").

Plaintiff has also failed to demonstrate that he would lose good-time credits for his refusal to participate in the SATP. Plaintiff's assertion in his brief that he would suffer such a

consequence is not supported by the record or legal authority. Under Kan. Admin. Reg. §§ 44-6-124(g)(6) and 44-6-142, some Kansas inmates may lose good-time credits for their refusal to complete a program such as the SATP. Section 44-6-142 provides that "good time credits shall be awarded on an earned basis pursuant to [§] 44-6-142 for the purpose of determining the conditional release date,"[6] and § 44-6-142 states that "[a] refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period." However, Plaintiff's good-time credits are not calculated by reference to these regulations because he was convicted prior to March 1, 1995. *See Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412, 421 (1998) (holding that application of these regulations to inmates convicted prior to March 1, 1995, violates the prohibition in the United States Constitution against ex post facto laws), *cert. denied*, *Hannigan v. Stansbury*, 525 U.S. 1060 (1998); *Stansbury v. Hannigan*, 265 Kan. 404, 960 P.2d 227, 230, 236 (1998) (same with respect to inmate who was convicted of rape in 1991 and refused to participate in the SATP), *cert. denied*, 525 U.S. 1060 (1998). Plaintiff's good-time credits therefore are calculated under the old regulations which do not penalize inmates for the failure to participate in the SATP. *See Stansbury*, 960 P.2d at 233.

As a result, the adverse consequences that Plaintiff would face for the refusal to participate in the SATP are the transfer to maximum security prison and the resulting loss of privileges. The critical question, then, is whether the State's imposition of these consequences in response to Plaintiff's invocation of his

[6] This means that, for qualifying prisoners, good-time credits are earned as the sentence progresses rather than presumed based upon maximum conduct and subject to forfeiture for misconduct.

Fifth Amendment right against self-incrimination constitutes impermissible compulsion.

2. Analyzing Compulsion

Determining whether the challenged policy or action is compulsory for Fifth Amendment purposes is a difficult task that depends upon consideration of many factors. There is no single test or factor that is dispositive, so we begin by examining Defendants' arguments.

a. The *Sandin* Analysis

Defendants argue that no compulsion exists because the adverse consequences present in this case implicate no protected liberty interest. Specifically, they claim that the Fifth Amendment is not violated because the consequences that would be imposed on Plaintiff as a result of his refusal to admit responsibility and disclose his past sex offenses do not constitute "atypical and significant hardship[s] on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

In *Sandin*, the Supreme Court addressed liberty interests in prison in the context of a procedural due process claim. The Court held that, despite the mandatory language of the applicable prison regulation, a constitutionally protected liberty interest will generally be "limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484 (citations omitted). Applying this test, the Court held that being placed in disciplinary segregation for thirty days did not impose an atypical and significant hardship, and therefore the inmate had no protected liberty interest which required due process. *See id.* at 486. Relying on earlier Supreme Court precedent, *Meachum v. Fano*, 427 U.S. 215, 225 (1976), this court recognized that, under the Due Process Clause, a change in "an inmate's prison classification ordinarily does not deprive him of liberty[ ] because he is not entitled to a particular degree

of liberty in prison." *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994).

However, nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur.[7] *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285-88 (1998) (evaluating Fifth Amendment claim without any reference to liberty analysis and applying liberty interest analysis to due process claim only). From our review of the cases, *Sandin* has not been expressly used to analyze any kind of constitutional right claimed by a prisoner other than a due process violation. Moreover, nothing in either Supreme Court or Tenth Circuit precedent "expressly rule[s] out a challenge to a [prison policy] ... on the ground that it violate[s] constitutional rights other than the right to procedural due process." *Furtado v. Bishop*, 604 F.2d 80, 87 (1st Cir. 1979) (explaining that Supreme Court precedent allows that a prisoner's confinement could violate the constitution even if it did not implicate a liberty

[7] In their brief, Defendants imply that the Eight Circuit's decision in *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666 (8th Cir. 1996), is one in which the court determined that there was no compulsion under the Fifth Amendment because the prisoner had no liberty interest in remaining in a work-release program. *See* Appellants' Br. at 15-16. Defendants' reliance on *Callender* is misplaced. In that case, the district court held that the prisoner's procedural due process rights had been violated because he was deprived of the liberty interest of remaining in the work-release program. The district court also held that requiring the prisoner to admit his guilt violated the Fifth Amendment right against self-incrimination but that the treatment center was entitled to qualified immunity on that claim. The Eight Circuit reversed. Observing that a sex offender program was part of the work- release program, the court held that revocation of the work- release program based on the prisoner's refusal to admit guilt did not violate the *Due Process Clause* because no liberty interest was implicated. The Eight Circuit did not address the Fifth Amendment claim. *See Callender*, 88 F.3d at 668-69.

interest or violate due process); *see also Frazier v. Dubois*, 922 F.2d 560, 561 (10th Cir. 1990) (surveying circuit court decisions and holding that "*Meachum* addressed only the due process clause"). This reasoning is equally applicable to a challenge to a sex offender treatment program based on a Fifth Amendment violation. *Cf. Chambers v. Bachicha*, 39 F.3d 1191, 1994 WL 596702 (10th Cir. 1994) (Table) (rejecting equal protection and due process claims because plaintiff challenging Colorado sex offender treatment program had no protected liberty interest in good-time or earned-time credit under discretionary Colorado statute, but not addressing liberty question with respect to Fifth Amendment claim); *Colman v. Lahouse*, 976 F.2d 724, 1992 WL 235534, at *3 (1st Cir. 1992) (relying on *Furtado* to state that Fifth Amendment claim challenging sex offender treatment program has an arguable legal basis because no liberty interest is required).

Accordingly, we agree with the district court's assessment that "by grafting a protected liberty interest to a finding of compulsion, the standard is set too high." *Lile*, 24 F. Supp. 2d at 1159. Compulsion can be established by hardships that may not be atypical and that do not constitute enforceable liberty interests. The Supreme Court has indeed articulated several different types of penalties that constitute impermissible compulsion, none of which are explicitly characterized as deprivations of protected liberty interests. These include the threat of disbarment, damage to professional reputation, or loss of income, *see Spevack v. Klein*, 385 U.S. 511, 516 (1967) (describing such penalties as "powerful forms of compulsion"), economic penalties such as the loss of employment, *see Turley*, 414 U.S. at 82 (ruling that cancellation of contracts and five-year disqualification to contract constituted impermissible economic compulsion); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 283-85 (1968) (holding that discharge for invoking and refusing to waive constitutional right against self-incrimination impaired Fifth Amendment privilege); *Garrity v. New Jersey*, 385 U.S. 493,

500 (1967) (holding that penalty of discharge for reliance on right to remain silent compelled policemen's incriminating testimony because it foreclosed a free choice to remain silent, and right against self-incrimination "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office"), and the loss of the right to participate in political associations, *see Cunningham*, 431 U.S. at 808-09 (depriving attorney of position as an unpaid political party officer would "impinge on his right to participate in private political associations"). *See also Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968) (reversing policeman's dismissal which was based solely on his refusal to waive immunity to which he would be entitled under the Fifth Amendment privilege against self-incrimination). There is nothing in our precedent that says a challenger must demonstrate a liberty interest to prevail on a Fifth Amendment right against self-incrimination claim.[8] *But cf. Tedder*, 1991 WL 65497, at *2 (holding that Oregon sex offender program did not violate plaintiff's right against self-incrimination in part because he has no constitutional right to discretionary parole before the expiration of his sentence); *Guilkey v. Holden*, 865 F.2d 258, 1988 WL 134526 (6th Cir. 1988) (Table) (affirming district

[8] In an unpublished decision, a panel of this court examined a similar Fifth Amendment challenge to a Colorado Department of Corrections' sex offender treatment program. *See Chambers*, 1994 WL 596702, at *3. The plaintiff alleged that the prison's policy of reducing the amount of good time for which he was eligible because he refused to admit he was a sexual offender violated his right against self- incrimination. The court held that there was no Fifth Amendment violation in part because the applicable regulation issued by the Department of Corrections mandated that information gained from the program remain confidential and in part because "there [was] no compulsion for Fifth Amendment purposes." *Id.* at *3. To the extent that *Chambers* may be interpreted as a rule that compulsion can occur only where one is forced to forgo a constitutional right or a liberty interest, we are not bound to follow it here. *See In re Citation of Unpublished Opinions/Orders & Judgments*, 151 F.R.D. 470 (10th Cir. 1993).

court determination that Fifth Amendment right against self-incrimination was not violated because plaintiff had no constitutionally protected liberty interest in discretionary parole). It is clear that the compulsion element of a Fifth Amendment claim can be established by penalties which do not constitute a deprivation of protected liberty interests under the due process clause.[9]

b. Substantial and Potent Penalties

The next critical question is whether the consequences imposed constitute penalties that are sufficiently potent and substantial to implicate the Fifth Amendment. *See Cunningham*, 431 U.S. at 805. Defendants argue that the prison's privileges and incentives program does not employ sanctions or penalties within the meaning of the Fifth Amendment. We are not so persuaded.

As noted above, Plaintiff's refusal to admit responsibility and disclose his sexual history would result in a transfer from medium security prison to maximum security. This transfer goes hand in hand with a reduction in the inmate's classification, from Level III to Level I, which would result in the loss and restrictions of many privileges. These include the loss of participation in prison organizations and activities, including the IMPP; the loss of personal TV; substantially restricted access to the yard area and gym; substantially

[9] While we do not necessarily disagree with the Kansas Supreme Court's determination that an inmate's housing and custody classifications and other privileges attendant to those classifications "are not atypical and do not pose a significant hardship within a prison" within the meaning of the due process clause, *Bankes v. Simmons*, 963 P.2d at 420, our holding instructs that the liberty analysis should not be part of a Fifth Amendment privilege case. *Cf. Stansbury v. Hannigan*, 960 P.2d at 238 (considering appropriately in due process analysis that "[t]he restrictions imposed at Level I do not impose an atypical or significant hardship ... on an inmate which would not have been contemplated in his or her original sentence").

restricted visitation rights; significantly restricted purchasing rights at the canteen in terms of the amount of dollars the inmate is permitted to spend per payroll period; reduction in incentive pay and corresponding job opportunities; and restricted ability to retain personal property. *See* App. at 29; Supp.App. at 100-01; *see also* Supp.App. at 66-68 (describing how much more dangerous maximum security is). In addition, the Warden of the Lansing Correctional Facility and the Secretary of the Kansas Department of Corrections confirmed by their deposition testimony that these and other restrictions would occur with the transfer of an inmate from Level III to Level I. *See* Supp.App. at 72 (admitting reduction in open yard schedule); Supp.App. at 80 (explaining movement from two-person cell in medium security to four-person cell or dorm in maximum security); Supp.App. at 81 (describing restrictions); Supp.App. at 103 (describing the greater potential for violence in maximum security); Supp.App. at 285 (explaining consequences for refusal to participate in program agreement).

We conclude that these deprivations and changes in environment are penalties sufficient to implicate the Fifth Amendment because they have substantial or potent effects on the inmate. *Cf. Brooker v. Warden*, No. 98-466-JD, 1999 WL 813893, at *4 (D.N.H. June 22, 1999) (recognizing "coercive effect of a requirement that an inmate satisfactorily participate in a sex offender treatment program" as a prerequisite to parole, but finding no compulsion because inmate voluntarily participated in program and because "he could choose not to participate without increasing the hardship of his incarceration since he was not subject to any additional punishment for refusing to participate").

The Supreme Court's decision in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), also illustrates how the consequences in this case constitute penalties within the Fifth Amendment. Mr. Palmigiano was an inmate of the Rhode Island Correctional

Institution serving a life sentence for murder. He was charged with a disciplinary infraction, and, during his disciplinary hearing, he was told "that he had a right to remain silent but that if he remained silent his silence would be held against him." *Id.* at 312. The Court held that an adverse inference may be drawn from a defendant's decision to remain silent at a prison disciplinary hearing without violating the prisoner's Fifth Amendment rights. *Id.* at 320. The Court reasoned that "a prison inmate in Rhode Island electing to remain silent during his disciplinary hearing ... is not ... automatically found guilty of the infraction with which he has been charged" because of his silence. *Id.* at 317. Thus, because "an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board," the court determined that the case was "very different from the circumstances before the court in the *Garrity-Lefkowitz* decisions, where refusal to submit to the interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to other evidence, resulted in loss of employment." *Id.* at 318.

The consequences at issue in this case are more like those in the *Garrity-Lefkowitz* decisions than in *Baxter*. Here, unlike in *Baxter*, Plaintiff's refusal to submit to the interrogation-to disclose the required information about his sexual history-standing alone, would certainly result in the transfer to Level I and the corresponding loss and restriction of many privileges. As a result, we think the substantial penalties imposed in this case rise above the threshold limit of consequences set forth in *Baxter* which are acceptable and do not violate the Fifth Amendment.

c. Voluntary Proceeding or Program

Defendants also claim that the adverse consequences imposed in this case are not compulsory because Plaintiff could choose not to participate in the SATP. In other words, Defendants assert that Plaintiff's participation in the SATP is voluntary.

The record offers differing evidence concerning whether participation in the SATP is officially required by Department regulations. It appears that the program was required when Plaintiff was first recommended for it in 1994. The policy has since been amended such that, officially, inmates may "volunteer" to enter the SATP. However, even if participation in the SATP is not officially required of every sex offender, the policy of imposing certain administrative consequences upon an inmate in the event that he refuses to participate lends an element of compulsion. In light of the fact that the Department would impose sanctions solely because Plaintiff wishes to remain silent and invoke his Fifth Amendment right against self-incrimination, we cannot see how his participation in the SATP is truly voluntary.

In addition, we think this case is distinguishable from the Supreme Court's recent decision in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272. In *Woodard*, the Court characterized the inquiry as "whether giving inmates the option of voluntarily participating in an interview as part of the clemency process violates an inmate's Fifth Amendment rights." *Id.* at 276. Mr. Woodard, a death row inmate, argued that because there was only one guaranteed clemency review and because his answers could have been used against him the interview was not truly voluntary and therefore it violated the Fifth Amendment. *See id.* at 285. The Court rejected this claim, concluding that the interview was voluntary and, as a result, Mr. Woodard was not compelled to speak. *See id.* at 286. Because Mr. Woodard retained the choice whether to "provid[e] information to the [Parole] Authority-at the risk of damaging his case for clemency or for postconviction relief-or ... [to] remain[ ] silent[,] ... [t]he pressure to speak in the hope of improving his chance of being granted clemency does not make the interview compelled." *Id.* at 287-88.

This case is distinguishable from *Woodard* for the simple reason that Mr. Woodard was not punished for invoking the

Fifth Amendment privilege. Rather, the clemency interview was voluntary and Mr. Woodard's eligibility for clemency did not depend on his participation in the interview. Though his participation in the clemency interview may have affected his chances for clemency, no separate and distinct substantial or potent consequences were imposed for his refusal to participate in the interview. Plaintiff in this case, however, is punished for refusing to participate in the SATP and invoking his Fifth Amendment privilege. Unlike the situation in *Woodard*, Plaintiff is not even eligible for the SATP without disclosing the requisite information about his sexual history, and his refusal to disclose is met with very specific, potent, and substantial consequences.[10]

This case also differs from the Supreme Court's decision in *Minnesota v. Murphy*, 465 U.S. 420. In that case, the Supreme Court addressed the Fifth Amendment privilege in a probation setting. Mr. Murphy was charged with criminal sexual conduct, pleaded guilty to a reduced charge, was placed on probation, and was required to participate in a sexual offender treatment program. In the course of the program, Mr.

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[10] Our decision that participation in the SATP is not voluntary is in direct opposition to the decision in *Searcy v. Simmons*, 97 F.Supp.2d 1055, 1059 (D.Kan. 2000). In *Searcy*, the district court interpreted *Woodard* as saying that there was no compulsion even though the inmate faced the loss of life. Based on this interpretation, the court concluded that there could be no compulsion from the loss of privileges and benefits. It therefore determined that the plaintiff's Fifth Amendment right against self-incrimination was not violated by the Kansas Department of Corrections' IMPP 11-101 and SATP because the court viewed participation in the SATP as voluntary. *See id.* We disagree with the *Searcy* court's characterization of *Woodard* and its resulting decision on the Fifth Amendment claim. Mr. Woodard was not facing a choice between clemency or no clemency (i.e., between life or death) depending on whether he participated in the clemency interview. Indeed, the clemency review process would occur with or without his participation. *See Woodard*, 523 U.S. at 276, 287-88.

Murphy, without claiming his Fifth Amendment right against self-incrimination, admitted to an earlier rape and murder for which he was subsequently prosecuted. Bringing a § 1983 action, he argued that the confession was inadmissible because he was compelled to admit the crimes or face revocation of probation. *See id.* at 434.

Relying on *Cunningham*, *Turley*, and other precedent, the Court observed that there was "a substantial basis" for concluding that an express or implied threat to revoke a convicted defendant's probation because he legitimately invoked the Fifth Amendment privilege would create "the classic penalty situation ... and the probationer's answers would be deemed compelled." *Id.* at 435. Despite these pronouncements, the Court held that, although the state conditioned probation on the giving of truthful answers in the therapy program, it did not violate the Fifth Amendment because it had not "attempt[ed] to take the extra, impermissible step" of compelling the answers. *Id.* at 436; *see also id.* at 437. Thus, because Mr. Murphy was not required to disclose specific incriminating statements but merely was required to be truthful to his probation officer, and because he was not threatened with a penalty for invoking the privilege, the Court held that the state did not violate the Fifth Amendment. *See id.* at 437, 440.

It is significant that Mr. Murphy was not required to disclose any specific information, nor was he penalized or punished for invoking his constitutional right. In short, other than the normal consequences flowing from his confession, Mr. Murphy was not punished or penalized *solely* for choosing to remain silent. However, that is exactly what would happen to Plaintiff here. Defendants' policy would respond to his refusal to admit responsibility and disclose his sexual history by transferring him to a higher level of security and substantially restricting the privileges that he had earned in the lower level of security.

d. Other Analytical Factors

Two additional considerations may generally be helpful in determining whether state action constitutes impermissible compulsion. The first is a distinction drawn between a privilege and a penalty. Defendants argue that a transfer from medium to maximum security housing and the attendant loss of privileges for refusing to participate in a prisoner treatment program do not constitute a penalty or punishment. Rather, these consequences are merely part of the Department's system of privileges and incentives utilized to encourage inmates to participate in programs. In other words, the State argues that punishment only occurs in response to a wrongful act taken by a prisoner.

This circuit has held that the characterization of state action as either withdrawing a privilege or imposing a penalty is indicative of whether the action constitutes compulsion. In *United States v. Rogers*, 921 F.2d 975, 982 (10th Cir.1995), the court held that "the denial of a downward adjustment under § 3E1.1 does not constitute a penalty or an enhancement of sentence" for purpose of the Fifth Amendment. In reaching this conclusion, we explained:

> There is a difference between increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed offense level. "'It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense.'"

Id. at 982-83 (citations omitted).

We do not believe that the distinction between a penalty and a privilege should be used as an absolute test for compulsion, but we believe that the distinction may be helpful in determining whether the government has sought to compel

self-incriminating testimony.[11] Though it would be inappropriate to find compulsion in a situation where the state has unquestionably imposed a penalty but that penalty is so de minimis in nature as to have no compulsive effect, that is not the situation here. In this case, Plaintiff was placed in medium security housing before prison staff recommended that he participate in the SATP. His participation in the SATP was not part of his sentence or court-ordered. As noted by the district court, the consequences attendant to an inmate's refusal to participate in the SATP under IMPP 11-101 are exactly the same as those "punishments" automatically imposed upon a prisoner for termination from a work assignment for cause, offenses for which felony charges are filed by a state prosecutor, or disciplinary convictions for offenses such as theft, drunkenness, use of narcotics, sodomy, riot, arson, assault, sexual activity, a relationship with staff, and possession of contraband. *See* App., Vol. I at 24-25; *Lile*, 24 F. Supp. 2d at 1155 n. 3. Thus, it appears that in this case the Department's transfer action and the resulting loss of privileges are properly characterized as imposing penalties. This serves to buttress our conclusion that the loss and restriction of the earned privileges corresponding to Level III status solely for refusing to provide incriminating information constitute potent and substantial

[11] The Supreme Court's decision in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), although a due process case, also supports the view that the privilege/penalty distinction is useful in determining the existence of a constitutional right. In *Greenholtz*, the Court concluded that due process protections do not arise simply because the state holds out the possibility of release on parole. *See id.* at 11. In reaching this conclusion, the Court specifically contrasted the granting of parole with the revocation of parole. *See id.* at 9-11. The Court emphasized that "there is a human difference between losing what one has and not getting what one wants.... That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained." *Id.* at 10-11.

penalties that would likely cause Plaintiff to feel that he has no choice other than to incriminate himself.

The second consideration that bears on whether the government has sought to compel self-incrimination is the automaticity of the penalty. The district court found that "the prison administrative sanctions attendant to [P]laintiff's refusal, automatically imposed by operation of IMPP 11-101," *Lile*, 24 F. Supp. 2d at 1158, are "impermissibly coercive" because they present a "costly burden to [P]laintiff's exercise of his rights under the Fifth Amendment." *Id.* at 1159. In several Supreme Court cases which all deal with attempts by prisoners or parolees to invoke the Fifth Amendment privilege and which hold that no constitutional violation occurred, none of the prisoners or parolees were automatically penalized for asserting the privilege. *See, e.g., Woodard*, 523 U.S. 272, *Murphy*, 465 U.S. at 429, and *Baxter*, 425 U.S. 308. We believe that the distinction between an automatic and a conditional consequence is helpful in determining whether government action rises to the level of compulsion. *See Cunningham*, 431 U.S. at 808 n. 5 (distinguishing *Baxter* on the ground that the penalty in that case was not imposed automatically). That said, the automaticity of a consequence is not dispositive in our determination because it fails to take into account the severity of the penalty. It remains worth noting that, unlike the consequences at issue in *Woodard*, *Murphy*, and *Baxter*, the adverse consequences in this case would be imposed on Plaintiff automatically once he refused to admit responsibility and disclose his sexual history and thereby refused to participate in the SATP. *See* App., Vol. 1 at 24 ("An inmate shall be automatically reduced to Level I for ... [r]efusal to participate in the recommended programs at the time of placement." (IMPP 11-101, pt. IV.B.2.)).

3. Constitutional Violation

For the foregoing reasons, we hold that there is a "reasonable basis for concluding that [Defendants] attempted

to attach an impermissible penalty to the exercise of the privilege against self-incrimination." *Murphy*, 465 U.S. at 437. The consequences that the Department would impose unless the constitutional privilege is surrendered in this case are sufficiently potent and substantial to constitute impermissible compulsion. Notwithstanding a Department regulation instructing that an "inmate shall not be penalized for refusal to participate in a formal program plan," Kan. Admin. Reg. § 44-5-105(c)(1), the policy that forces Plaintiff to choose between admitting incriminating information required for participation in the SATP and incurring the substantial and potent penalties that would be imposed if he refused to participate is "capable of forcing the self-incrimination which the Amendment forbids." *Cunningham*, 431 U.S. at 806; *cf. State v. Imlay*, 249 Mont. 82, 813 P.2d 979, 985 (1991) (ruling that Fifth Amendment was violated where defendant's probation was revoked for his refusal to admit under a court-ordered sexual treatment program that he was guilty of the crime of which he had been charged and convicted). In sum, the State has violated Plaintiff's Fifth Amendment right against self-incrimination.

C. Balancing

Although we have determined that there has been a violation of Plaintiff's constitutional right against self-incrimination, our analysis is not complete. Because of the institutional context of this case and the great deference that is owed to the management decisions and policies of prison officials, we believe it is appropriate to balance the prison's penological interests against the prisoner's constitutional right.[12] The Supreme Court routinely assesses the

[12] This balancing differs from Defendants' argument that government interest is significant in determining whether the Fifth Amendment has been violated because we apply the balancing analysis only after a constitutional violation has been found.

constitutionality of prison regulations and practices by examining whether the prison policy at issue "is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *accord Frazier v. Dubois*, 922 F.2d 560 (10th Cir. 1990). Though we are mindful of the historical importance of the right against self-incrimination, which emerged as a reaction to coercive and oppressive tactics used in the Spanish Inquisition, in the persecution of the Puritans in England, and by British colonial officials, we see no reason not to apply the balancing test of *Turner* here.

As a threshold matter, we examine whether the State has articulated its interests in requiring a participant in the SATP to disclose past sexual history. Though much of the State's briefs focus on its argument that the Fifth Amendment does not apply because Plaintiff has no protected liberty interest and because the benefits withheld did not constitute compulsory penalties, it is perfectly obvious from the briefs and the record that the State has two interests that are served by the SATP and its transfer policy: promoting rehabilitation and increasing public safety. For example, the State says:

> [T]he treatment of sex offenders serves the laudable goal of protecting the citizens of the state of Kansas. Additionally, as part of sexual abuse treatment, it is necessary for the participant to accept responsibility for his or her actions otherwise treatment will not be effective. These substantial interests of the State of Kansas justify the Department of Corrections' interest in offenders participating in SATP to accept responsibility for their deviant behavior.

Appellants' Br. at 21. The State also emphasizes that "the Department of Corrections is justified in concluding that ... plaintiff and society would benefit from his meaningful participation in a treatment program. Meaningful participation would include a full and honest assessment of plaintiff's sexual deviances." *Id.* at 22; *see also id.* at 4, 5, 13; Third Br. on

Cross Appeal at 3, 8. Thus, it is clear that the State's interests in rehabilitation and public safety are legitimate penological interests for its admission-of-responsibility policy. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (stating that legitimate penological objectives include "rehabilitation, deterrence and security"). *But cf. Mace v. Amestoy*, 765 F.Supp. 847, 852 (D.Vt. 1991) (stating that, while "the state has a legitimate rehabilitative purpose in demanding full disclosure" in a sex offense treatment program, the interest "does not make the disclosure any less incriminating" or violative of the Fifth Amendment privilege).

Because we believe that the prison policy impinges on Plaintiff's constitutional right against self-incrimination, we must determine whether the policy "is reasonably related to legitimate penological interests," *Turner*, 482 U.S. at 89, by weighing the following four factors: (1) whether there is "a 'valid, rational connection' between the prison regulation [or practice] and the legitimate governmental interest" advanced as its justification, *id.* at 89; (2) whether there are "alternative means of exercising the [constitutional] right" that remain open to prisoners notwithstanding the policy or regulation, *id.* at 90; (3) what impact accommodation of the right would have on guards, other inmates, and the general allocation of prison resources, *see id.*, and (4) whether there are obvious, easy-to-implement alternatives that would accommodate the prisoner's right at little cost to valid penological interests. *See id.* at 90-91.

It appears that the first question is answered in the affirmative: There is a rational connection between the policy of having prisoners admit responsibility for their offenses and disclose their sexual history in order to participate in the SATP and the legitimate governmental interest in rehabilitation of sex offenders. In fact, most mental health experts agree that "a sex offender must admit his guilt for treatment and rehabilitation to be successful." Brendan J. Shevlin, Between the Devil and the

Deep Blue Sea: A Look at the Fifth Amendment Implications of Probation Programs for Sex Offenders Requiring Mandatory Admissions of Guilt, 88 Ky. L.J. 485, 485 (2000); *see also* Jonathan Kaden, Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination, 89 J.Crim. L. & Criminology 347 (1998). This factor obviously weighs in favor of the State.

Second, there is no evidence that Plaintiff has any alternative means of exercising his Fifth Amendment right against self-incrimination. This is not like a case where a prisoner may have alternative means of exercising his First Amendment right to free exercise of religion. *See, e.g., Shabazz*, 482 U.S. at 351-53 (treating the ability of Muslim prisoners to participate in other religious observances of their faith as one factor supporting the reasonableness of a restriction on the right of prisoners to attend Jumu'ah services); *Stewart v. Thomas*, 176 F.3d 489, 1999 WL 203165, at *3 (10th Cir. 1999) (Table) (determining that Muslim inmate retained an alternative means of exercising his constitutional right because prison completely removed pork from the menu and inmates were able to eat meals before sunrise and after sundown). This factor weighs in favor of Plaintiff.

With respect to the third factor, there is no evidence that accommodation of the right would have any negative effect on guards, other prisoners, or prison resources. In fact, there is no suggestion that Plaintiff is a security or behavioral risk other than that he is not participating in the behavioral treatment program because he refuses to give up his Fifth Amendment right. This case clearly does not implicate the management and security of the prison population at large, but instead focuses on the rehabilitation of sex offenders in general and an individual prisoner specifically. If this factor weighs at all, it probably weighs slightly in favor of Plaintiff.

Fourth, the most "obvious, easy alternative" to the challenged policy would be one that has been contemplated by the Supreme Court since the very inception of the Fifth Amendment right against self-incrimination-granting immunity or privileging the statements disclosed. *See, e.g., Murphy*, 465 U.S. at 436 n. 7; *Brown v. Walker*, 161 U.S. 591, 594-95 (1896). Many states, in fact, already incorporate some system of confidentiality into their treatment programs. *See, e.g.*, Cal. Evid. Code §§ 1012, 1014 (governing confidentiality of patient-psychotherapist in sex offender treatment program); Ky. Rev. Stat. Ann. § 197.440 (providing generally that admissions made within sex offender treatment program are privileged communications not subject to disclosure in civil or criminal proceeding); *see also Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999) (noting district court's ruling that any admission of guilt required by sex offender treatment program would be privileged communication not subject to disclosure in a judicial proceeding under Alabama law); *Chambers v. Bachicha*, 1994 WL 596702, at *3 (noting Colorado Department of Corrections' Administrative Regulation 950-5 providing for confidentiality of prison records); *Tedder v. Francke*, 1991 WL 65497, at *2 (stating that admissions made during sex offender treatment program were privileged under Oregon evidentiary rule, Or. Rev. Stat. § 40.230). An obvious tension exists between the goal of rehabilitation and the threat of further prosecution, a tension that would be eased by granting immunity or privileging statements. *See* Shevlin, 88 Ky. L.J. at 491-92, 500-02; Kaden, 89 J.Crim. L. & Criminology at 385-89. We are inclined to believe that prisons may better accomplish their goal of rehabilitation if they encourage inmates to admit their sex offenses by granting immunity or making statements privileged.[13]

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[13] While there may be incrimination problems for future perjury which is typically not immunized, any perjury in this case stemming from a not-guilty plea would be past perjury and would be immunized like other past crimes.

The State claims that it "is not required to pursue its interest in having offenders sentenced to its custody participate in sexual abuse treatment at the expense of foregoing the criminal prosecution of sex crimes." Third Reply Br. at 13. The Supreme Court has stated, however:

> The privilege [against self-incrimination] has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to ... criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection.

New Jersey v. Portash, 440 U.S. 450, 457-58 (1979) (*quoting Kastigar v. United States*, 406 U.S. 441, 453 (1972)). Accordingly, an inmate like Plaintiff would not be immunized from any and all prosecution. Rather, he would receive immunity only from prosecution that is based on his immunized statements. Therefore the State does not lose anything it has not already lost because Plaintiff here invokes his right against self-incrimination and refuses to admit responsibility for his offense of conviction and disclose his sexual history without being immunized.

In our view, this fourth factor weighs heavily in favor of Plaintiff. The prison can preserve its goal of reinforcing constructive behavioral changes in sex offenders, and Plaintiff's right against self-incrimination is not compromised because he is granted immunity for his disclosures (or such statements are privileged).

In sum, the real balance turns on the seriousness with which we have always treated the Fifth Amendment right

against self-incrimination against the ease with which the State can accommodate or satisfy this right and still meet its legitimate program objectives. Because granting immunity or privileging statements in no way restricts the State's interests in rehabilitation or public safety, we think the *Turner* balancing easily weighs in favor of Plaintiff. While we applaud the efforts of states to rehabilitate prisoners, especially where their crimes involve sexual offenses and abuse of children, they may not tie rehabilitation to an inmate's surrender of his Fifth Amendment right against self-incrimination where the *Turner* balancing weighs in favor of the inmate. Therefore, we conclude that the policy is not reasonably related to legitimate penological objectives, and we hold that it violates Plaintiff's Fifth Amendment right against self- incrimination. We accordingly affirm the district court's judgment granting summary judgment to Plaintiff on his Fifth Amendment claim. Though the State cannot penalize Plaintiff for invoking his Fifth Amendment right in this case, it can determine if it wishes to modify its program by implementing a system of confidentiality or granting immunity.

II. Fourth Amendment

Because we have determined that the Kansas SATP unconstitutionally violates Plaintiff's Fifth Amendment right against self-incrimination, his appeal on the Fourth Amendment claim is moot. We therefore vacate the portion of the district court's judgment granting summary judgment to Defendants on the Fourth Amendment claim and remand to the district court with instructions to dismiss that claim as moot.

AFFIRMED in part and VACATED and REMANDED in part.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT G. LILE, Plaintiff, v. DAVID R. MCKUNE, et al., Defendants.	No. 95-3266-DES

Sept. 16, 1998

MEMORANDUM AND ORDER

SAFFELS, Senior District Judge.

Plaintiff, a prisoner confined in Lansing Correctional Facility in Lansing, Kansas, proceeds in forma pauperis and with appointed counsel to challenge the constitutionality of a sex offender treatment program required by the Kansas Department of Corrections ("DOC"). Before the court are cross motions for summary judgment by the parties.

BACKGROUND

A jury convicted plaintiff in 1983 of kidnaping, rape, and aggravated sodomy. Plaintiff denied all charges and testified at trial that his conduct with the victim, including sexual intercourse, was consensual. The Kansas appellate courts affirmed plaintiff's conviction. At the time he filed his complaint, plaintiff had a petition for writ of habeas corpus under 28 U.S.C. § 2254 pending before this court in which he alleged constitutional error in his state court conviction.

Plaintiff is currently incarcerated at Lansing Correctional Facility ("LCF") in Lansing, Kansas, serving a controlling life sentence.

When plaintiff was first incarcerated, DOC staff determined the sex offender treatment program would not be required. In 1994, plaintiff's Unit Team Counselor added the Sex Offender Treatment Program ("SOTP," the precursor to the current program, Sexual Abuse Treatment Program "SATP"), a clinical rehabilitation program, to plaintiff's inmate program agreement ("IPA"). After exhausting administrative remedies on an unsuccessful grievance challenging the addition of this programming, plaintiff signed the modified IPA, but refused to participate in the recommended program which required the signing of an "Admission of Guilt" form.[1]

In 1995, DOC amended state regulations[2] and revised its internal management policies and procedures ("IMPP"). The revised IMPP 11-101, effective January 1, 1996, is characterized as an incentive level system that links privileges and custody classifications to successful prison accomplishment, such as the completion of required programming. As applied to plaintiff, the documented failure to complete a recommended program on his IPA would automatically impair his ability to earn good time, and would result in his transfer to maximum custody and the loss of

[1] After plaintiff filed this lawsuit, DOC retitled the "Admission of Guilt" form to read "Admission of Responsibility," and added the statement that SATP was a voluntary program.

[2] The 1995 amendments to K.A.R. 44-6-124 and 44-6-142 provide for the withholding of 100% of the good time credits for each classification review period of an inmate who refuses to participate in assigned programming. The 1995 amendments further require that all good time credits are now to be earned as the sentence progresses, rather than presumed based upon the maximum sentence and subject to forfeiture only for misconduct.

privileges for that review period. These consequences, acknowledged as part of the "incentive" for completion of recommended programming, mirror the consequences imposed for serious disciplinary infractions.[3]

The resulting conditions in maximum custody go beyond the lack of a personal television. Plaintiff would be placed in a more dangerous environment occupied by more serious offenders. He would not be able to earn more than $0.60 a day for prison pay, and he would not be eligible for industries work. Visitation would be restricted to attorneys, clergy, law enforcement and his immediate family. Other approved visitors would not be allowed. Available programming would be limited, as would the amount of personal property he could retain in his cell.

In addition to signing an "Admission of Guilt" form, plaintiff objected to the SATP requirement that all participants generate a written sexual history which includes all prior sexual activities, regardless of whether such activities constitute uncharged criminal offenses. Polygraph examinations are used to verify the accuracy and completeness of the offender's sexual history. Plethysmograph testing is used for diagnostic and treatment purposes. The results of the plethysmograph and polygraph exams are to be discussed in group therapy sessions. Although participants are instructed to keep confidential the information elicited during the therapy sessions, and may be terminated from the program for failing to do so, the confidentiality of this information is expressly limited. The parties acknowledge that Kansas law requires

[3] The policy, as clarified February 1, 1996, also automatically subjects a prisoner to the same restrictions upon a disciplinary work conviction, upon the filing of felony charges by a state prosecutor, or upon disciplinary convictions for serious offenses such as theft, riot, arson, relationship with staff, and possession of contraband. IMPP 11- 101, Section IV.B.1-4.

SATP staff to report any disclosed uncharged sexual offense,[4] and that all SATP participant files are subject to subpoena.

In cross motions for summary judgment, the parties seek resolution of two constitutional issues. The first is whether the operation of the SATP and related prison regulations and policies violates plaintiff's constitutional right against self incrimination. Second is whether the SATP Program at LCF is conducted in a manner impermissibly invasive of plaintiff's constitutional right to privacy and bodily integrity.

SUMMARY JUDGMENT STANDARDS

Under the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing summary judgment motions, the evidence must be viewed in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

The fact that both parties have filed cross-motions for summary judgment does not change this standard of review. *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 249 (6th Cir. 1991). The court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under

[4] *See* K.S.A. 38-1522 (mandated reporting of abuse or neglect of children).

consideration. *Mingus Constructors, Inc. v. U.S.*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).

DISCUSSION

Fifth Amendment

Fifth Amendment, applicable to the states through the Fourteenth Amendment,[5] provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. Art. V. The Amendment "must be accorded liberal construction in favor of the right it was intended to secure," *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951), and it clearly extends to incarcerated prisoners, *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

The constitutional right against self-incrimination turns not on the type of proceeding, but the nature of the statement or admission that is invited. *Estelle v. Smith*, 451 U.S. 454, 462 (1981). The Fifth Amendment "privileges [the individual] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings ... unless and until he is protected at least against the use of his compelled answers." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973)).

The privilege should be affirmatively and timely asserted. *Murphy*, 465 U.S. at 429. A state does not abridge the right against self-incrimination when an individual waives the privilege by communicating voluntarily. *U.S. v. Washington*, 431 U.S. 181, 186 (1977).

There is a longstanding Supreme Court directive that the privilege against self- incrimination is "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). The "mischief" identified in the

[5] *Malloy v. Hogan*, 378 U.S. 1 (1964).

present case involves the State's acquisition of therapeutic confessions in the SATP Program at LCF.

Plaintiff first claims the significant adverse regulatory consequences attendant to his refusal to fully participate in the SATP Program at LCF unconstitutionally compels his disclosure of potentially incriminating information without the protection of immunity.[6] Secondly, plaintiff claims he should not be punished by operation of IMPP 11-101 for asserting his right against self incrimination.

Defendants contend the Fifth Amendment is not applicable to this non-criminal setting, and maintain there is no compulsion in this voluntary program. Defendants further argue the withholding of discretionary privileges is allowable if plaintiff refuses to participate in required prison programming. Defendants do not dispute plaintiff's claim that no express immunity is provided to SATP participants.

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[6] Plaintiff also contends the incriminating information could be used in a commitment proceeding against him under the Kansas Commitment of Sexually Violent Predators Act, K.S.A. 59-29a01 *et seq.*

The protection of the Fifth Amendment bars the use of compelled self-incriminating statements in a later criminal action against the declarant. It does not bar the use of such statements in a later civil proceeding. *See e.g., Allen v. Illinois*, 478 U.S. 364 (1986) (Fifth Amendment did not apply to civil involuntary commitment of sexually dangerous person). *Accord, Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412 (1998) (Fifth Amendment does not apply to SATP disclosures used in civil involuntary commitment proceedings).

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Supreme Court found the commitment proceedings under the Kansas Act to be civil in nature. Thus, it is now clear that in such proceedings, the Fifth Amendment privilege against self incrimination would not be offended by the use of incriminating information elicited in the sex offender treatment program.

The court first examines whether there is merit to plaintiff's Fifth Amendment claim, and if so, the remedy to afforded in this case.

Fifth Amendment—Incrimination

The court easily finds the information required to be disclosed under the SATP Program is sufficiently incriminating for Fifth Amendment purposes.

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman*, 341 U.S. at 486-87. The privilege "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. U.S.*, 406 U.S. 441, 445 (1972). Although the fear of prosecution must have some foundation, the assertion of the privilege does not depend on the likelihood of future prosecution. *U.S. v. Jones*, 703 F.2d 473, 477-78 (10th Cir. 1983).

By requiring the complete and written disclosure of a prisoner's sexual history, including all uncharged sexual offenses, SATP clearly seeks information that could incriminate the prisoner and subject him to further criminal charges.[7]

Because the sexual history disclosure clearly satisfies the incrimination inquiry, the court does not decide whether a

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[7] Where no confidentiality is afforded such disclosures in SATP, similar programs operating with greater confidentiality can be easily distinguished. *See Chambers v. Bachicha*, 39 F.3d 1191 (unpublished decision), 1994 WL 596702 (10th Cir. 1994) (no Fifth Amendment violation found, in part, due to recognized confidentiality of prison records, and no evidence that confidentiality provision had been or ever would be breached).

written "admission of responsibility" of plaintiff's behavior leading to his convicted offense, standing alone, would be sufficiently incriminating to invoke the protection of the Fifth Amendment.[8]

Fifth Amendment—Compulsion

The court also finds the SATP Program at LCF, in conjunction with DOC policies and practices, operates to compel the disclosure of such incriminating testimony.

Compulsion is the "touchstone of the Fifth Amendment." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). While there is no compulsion if the incriminating testimony elicited is truly voluntary, the undisputed facts in the record do not lead to such a finding in this case.

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[8] Courts are not hesitant to find incrimination if a prisoner's direct appeal could be affected by such an admission. *See e.g., Taylor v. Best*, 746 F.2d 220, 222 (4th Cir. 1984) (privilege against self-incrimination applies to questioning about the charged offense while the declarant's appeal from that conviction is pending), *cert. denied*, 474 U.S. 982 (1985). It is also recognized that an admission after the exhaustion of the direct appeal may still be incriminating. *State of Montana v. Imlay*, 249 Mont. 82, 813 P.2d 979 (1991) (post-conviction remedies would be rendered meaningless by compelled admission of guilt), *cert. granted*, 503 U.S. 905, *cert. dismissed as improvidently granted*, 506 U.S. 5 (1992).

In this case, plaintiff's conviction has been rendered final by exhaustion of all direct review. Any admission of guilt now only potentially threatens collateral review, and has only a distant or speculative chance of affecting this presumptively valid conviction. *See e.g., Neal v. Shimoda*, 131 F.3d 818, 833 (9th Cir. 1997) (where no challenge to the conviction and no evidence that the inmate intends attempt to withdraw plea, there is only a remote and speculative possibility that inmate's admission to sex offenses will be incriminating in a future criminal proceeding). There still remains, however, the possible criminal charge of perjury where plaintiff testified in court that he did not commit the offense, and then declares otherwise in a written "admission of responsibility." *See* K.S.A. 21-3805 (criminal offense of perjury).

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Supreme Court held that the pressure to divulge potentially incriminating evidence in a voluntary clemency interview does not constitute compulsion under the Fifth Amendment. *Id.* That holding rests squarely on a finding that the clemency proceeding was voluntary. Other than the consequence to the prisoner's chance of obtaining clemency, no automatic administrative sanction attached to that prisoner's refusal to divulge the requested information. This is consistent with Supreme Court precedent that the choice to waive the privilege against self-incrimination is considered voluntary only if the individual suffers no such penalty as a result.[9] *Murphy*, 465 U.S. at 428.

However, when the government compels incriminating testimony by threat of "potent sanctions," the testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a later criminal proceeding. *Cunningham*, 431 U.S. at 805 (*citing Garrity v. State of N.J.*, 385 U.S. 493 (1967)). A waiver secured under threat of such sanction cannot be termed voluntary. *Turley*, 414 U.S. at 82-83.

In the present case, plaintiff's refusal, on constitutional grounds, to participate in the SATP Program would be considered voluntary within the ambit of *Woodard* if the consequences were limited to the effect of such refusal on the parole board's discretionary decision of whether to grant plaintiff parole. However, the prison administrative sanctions

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[9] *Woodard* also reflects court decisions finding no Fifth Amendment violation in presenting a criminal defendant with difficult or tactical choices such as waiving the right against self-incrimination by entering a guilty plea, *Godinez v. Moran*, 509 U.S. 389, 398 (1993), or admitting responsibility for the purpose of obtaining a reduction in sentence, *e.g. U.S. v. Trujillo*, 906 F.2d 1456 (10th Cir.), *cert. denied*, 498 U.S. 962 (1990).

attendant to plaintiff's refusal, automatically imposed by operation of IMPP 11-101, clearly go further and defeat defendants' claim that plaintiff's participation in the challenged program constitutes a voluntary waiver of plaintiff's rights under the Fifth Amendment.[10]

The Kansas Supreme Court recently found SATP's required "admission of responsibility" and disclosure of uncharged sexual offenses violated a prisoner's rights under the Fifth Amendment. *Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412 (1998). In that case, as in the case presently before this court, the prisoner-plaintiff had asserted his right under the Fifth Amendment in refusing to comply with SATP programming requirements. Each testified at trial to deny the offense, and thus was subject to the charge of perjury upon an admission of guilt in SATP. Each had some form of judicial review of his conviction pending at the time he was required to comply with SATP program requirements.

The compulsion identified in *Bankes* arose out of the state prison regulations applicable to the prisoner's refusal to participate in the SATP Program. The Kansas Supreme Court found operation of the 1995 state regulations unconstitutionally

[10] The court notes defendants' insistence that IMPP 11-101 involves the withholding of administrative "incentives" rather than imposition of administrative "sanctions." The distinction has little significance where plaintiff faces the loss of present and more favorable classification and privileges solely as a result of his refusal, on constitutional grounds, to participate in the SATP Program.

The court further finds the administrative sanctions at issue operate automatically upon plaintiff's refusal to comply with the SATP Program requirements. Although defendants indicate prisoners can successfully complete the SATP Program at LCF without undergoing the plethysmograph and polygraphy testing, their examples cite individuals in the program before such testing was implemented, or individuals with medical problems. There is nothing in the record to suggest that plaintiff would fit either category.

lengthened the prisoner's period of incarceration by withholding good time credits that had been presumed in calculating the prisoner's conditional release date upon his incarceration prior to the 1995 change in the regulations.

In the present case, plaintiff's argument focuses instead on the operation of prison policy IMPP 11-101 which imposes significant and adverse consequences to plaintiff's classification, housing, and privileges if he refuses to participate in the required programming.

The adverse consequences of prison policies and practices have been examined in the context of raising a constitutional claim. In *Lucero v. Gunter*, 17 F.3d 1347 (10th Cir. 1994), the court recognized that although the challenged urinalysis testing was reasonable under the Fourth Amendment, the adverse consequences attendant to the prisoner's refusal to submit to testing were sufficient to establish standing to raise the constitutional claim.[11]

Here, defendants essentially argue that no compulsion results pursuant to the adverse consequences under the revised IMPP 11-101 because no protected liberty interest is implicated where the prisoner is not subjected to conditions atypical to his incarceration. *See e.g., Bollig v. Fiedler*, 863 F. Supp. 841 (E.D. Wis. 1994) (due process claim defeated because no protected liberty interest in right to be free of forced participation in prison educational rehabilitation program).

However, by grafting a protected liberty interest to a finding of compulsion, the standard is set too high. Whereas no *atypical* hardship may be at issue, and thus no threat to an interest protected by the Due Process Clause, there remains the

[11] The Fifth Amendment claim in *Lucero* was defeated because blood and urine samples were nontestimonial evidence, and thus did not implicate prisoner's right against self-incrimination.

possibility that the hardship attendant to a prisoner's refusal to participate in the SATP Program is sufficient compulsion for purposes of the Fifth Amendment. The Supreme Court has recognized that compulsion under the Fifth Amendment can be established by the threat of a substantial economic burden, notwithstanding the fact that no enforceable property interest or claim may be at risk. *Cunningham*, 431 U.S. at 807.

Within the context of plaintiff's incarceration, operation of IMPP 11-101 clearly presents such a costly burden to plaintiff's exercise of his rights under the Fifth Amendment. *See e.g. Neal*, 131 F.3d at 829 (coercive effect of sex offender treatment program recognized where non-completion of program renders inmate ineligible for parole); *McMorrow v. Little*, 109 F.3d 432 (8th Cir. 1997) (Fifth Amendment protects prisoner's refusal to admit to crime where prisoner threatened with loss of benefits, including the withholding of parole and work release, and the withholding of less restrictive confinement).

If such administrative consequences were not present, IMPP 11-101 would not be impermissibly coercive under the Fifth Amendment. *See e.g., Russell v. Eaves*, 722 F. Supp. 558 (E.D. Mo. 1989) (no compulsion found in the acceptance of responsibility by prisoners in state sexual offender treatment program where prisoners could refuse to participate and no administrative consequences identified as automatically attendant to such refusal), *appeal dismissed*, 902 F.2d 1574 (8th Cir. 1990).

Fifth Amendment—Immunity

The court next turns to the consequences resulting upon plaintiff's valid assertion of his rights under the Fifth Amendment.

It is clear that citizens may not be forced to incriminate themselves simply because it serves a governmental need. *Turley*, 414 U.S. at 78-79. A legitimate state rehabilitative

purpose for compelling disclosure does not make the disclosure any less incriminating. *Mace v. Amestoy*, 765 F.Supp. 847, 852 (D. Vt. 1991).

The Supreme Court has recognized that if prisoners are compelled "to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered whatever immunity is required to supplant their privilege and may not be required to waive such immunity." *Baxter*, 425 U.S. at 316 (quotations omitted). The sensible administration of a state rehabilitative system can create the need for a "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Turley*, 414 U.S. at 81 (*quoting Kastigar*, 406 U.S. at 446).

Thus the state may, without violating the Fifth Amendment, require answers to potentially incriminating questions "as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." *Murphy*, 465 U.S. at 436 n. 7. *See e.g. Baxter*, 425 U.S. at 318-19 (where immunity against use of incriminating disclosures in subsequent criminal proceedings is assumed, Fifth Amendment did not bar use of inmate's silence in prison disciplinary proceedings).[12] *See Grand Jury*

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[12] At issue in *Baxter* was the adverse use of a prisoner's silence at his disciplinary hearing. Recognizing the competition between the individual's assertion of privilege and the state's interest in prison disciplinary management, the Court authorized the imposition of consequences if the prisoner failed to answer questions that served state interests beyond that of a criminal conviction. *Accord, Shimabuku v. Britton*, 503 F.2d 38, 45 (10th Cir. 1974) (use immunity for statements given in prison disciplinary proceeding accommodated competing interests in self-incrimination privilege and prison discipline).

See generally, Solkoff, Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs, 17 Nova L. Rev. 1441 (1993) (courts to invest probationers with immunity to

Subpoenas Dated Dec. 7 and 8, to Stover v. U.S., 40 F.3d 1096, 1102-03 (10th Cir. 1994) (scope of immunity against use of compelled self- incriminating statements outlined, following *Garrity*), *cert. denied*, 514 U.S. 1107 (1995).

The Kansas Supreme Court followed such course by extending immunity to incriminating SATP disclosures made by prisoners subject to the unconstitutional withholding of good time under the amended state regulations. *Bankes*, 265 Kan. 341, 963 P.2d 412, 1998 WL 289193 at *9. This court follows the same path. Where a prisoner asserts his constitutional right against self incrimination in the SATP Program at LCF, immunity protects all incriminating disclosures compelled by the operation of prison policy IMPP 11-101 from being used against plaintiff in later criminal proceedings.[13]

Notwithstanding the court's decision that interference with DOC's SATP programming is not required, plaintiff has sustained his burden of demonstrating constitutional error and has obtained judicial relief on the claim. Plaintiff is granted summary judgment on his Fifth Amendment claim.

Right to Privacy

Plaintiff claims the plethysmograph testing in the SATP Program violates his constitutionally protected right to privacy and bodily integrity.

Defendants use a penile plethysmograph examination in the SATP Program at LCF to develop specific treatment plans

protect Fifth Amendment privilege and to further mandated treatment).

[13] The court is not required to consider whether the refusal to comply with SATP disclosure requirements without assertion of the privilege is sufficient to satisfy any of the recognized exceptions to the general rule that the Fifth Amendment is not self-executing. *See e.g.*, Murphy, 465 U.S. at 434-35 (if sufficient penalty asserted for exercise of privilege, failure to assert privilege is excused).

for the participating inmate. The plethysmograph assesses the degree of a test subject's sexual arousal, through changes in penile tumescence. The testing employs an electronic device consisting of a pressure- sensitive ring which is placed around a subject's penis to measure and record increases in penis size in response to various audio recordings of projective sexual scenarios presented from the perspective of a person committing a sexual offense. Inmates describe the audio recordings of various sexual scenarios as lasting about 40 minutes, and as including graphic and violent scenes of nonconsensual sexual behavior.

Plaintiff maintains he has a constitutional right to refuse plethysmograph testing[14] in the SATP Program at LCF. He claims plethysmography is an extremely intrusive procedure which is not accepted as scientifically valid and reliable, especially if such testing is against the prisoner's will. Plaintiff further maintains the testing at LCF is conducted by unqualified and untrained personnel.

Defendants contend there is no privacy invasion because the program is voluntary, the nature of the program and testing is fully disclosed so that an inmate can make a knowledgeable decision to participate, and the inmates are not viewed or touched during the testing.

Among the uncontroverted facts in the record is the recognition that it is critical for the SATP clinician to create a therapeutic alliance with the sex offender to ensure successful rehabilitation and to ensure the sex offender is sincerely motivated to work on controlling his deviant behavior. The

[14] Plaintiff also claims he has a constitutional right to refuse polygraph testing. Plaintiff's allegations regarding this form of testing rest on the alleged unreliability of the procedure. He does not allege the polygraph testing in the SATP Program at LCF invades a protected privacy interest. The court's analysis of plaintiff's Fourth Amendment privacy claim thus focuses on the challenged plethysmograph testing.

parties disagree whether IMPP 11-101 constitutes sufficient coercion to interfere with this requisite alliance. The assessment report prepared by the National Institute of Corrections, and used by defendants to develop the current SATP Program, does not address the need for, or the effect of, an incentive policy like that adopted in IMPP 11- 101. The parties disagree whether a successful sex offender treatment program requires plethysmograph testing.

The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Constitution, Art. IV. Where personal and deeply rooted privacy concerns are implicated, the Fourth Amendment "guarantees the privacy, dignity and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613-14 (1989) (citations omitted). It protects against intrusions not justified by the circumstances, or conducted in an improper manner. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

Although convicted prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison," *Bell v. Wolfish*, 441 U.S. 520, 545 (1979), the Supreme Court has recognized that incarceration necessarily limits the privileges and rights of convicted prisoners, *Pell v. Procunier*, 417 U.S. 817 (1974). It is established, for instance, that prisoners have no legitimate expectation of privacy in their cells, and that absent substantial evidence in the record that officials have exaggerated their response, a prisoner's expectation of such privacy must yield to institutional security concerns. *Wolfish*, 441 U.S. at 547-48; *Hudson v. Palmer*, 468 U.S. 517 (1984).

A search of a prisoner's body, however, is a qualitatively different matter. *Dunn v. White*, 880 F.2d 1188, 1190 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990). A prisoner retains a privacy interest in the integrity of his own person.

Wolfish, 441 U.S. at 558. *See e.g. Hayes v. Marriott*, 70 F.3d 1144, 1146 (10th Cir. 1995) (prisoner retains limited constitutional right to bodily privacy, particularly as to searches by staff members of opposite sex); *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards).

A State's acquisition and examination of evidence may be a search under the Fourth Amendment if such governmental action "infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner*, 489 U.S. at 616. Accordingly, the collection of revealing private physiological data has been found to be an invasion of privacy interests. *Id.* at 617.

Whether the government is pursuing civil or criminal objectives, such intrusion into constitutionally protected privacy rights requires analysis of the reasonableness of the search under the Fourth Amendment. "[T]he permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner*, 489 U.S. at 619 (quotation and citations omitted). *See e.g., Dunn*, 880 F.2d at 1193-94 (prison officials to balance intrusiveness of testing prisoner's blood for AIDS against the need for such testing). The reasonableness of the intrusion requires the examination of the nature of the search and of all the surrounding circumstances. *Skinner*, 489 U.S. at 619. Where privacy expectations are reduced and the intrusion of privacy interests is minimal, the Fourth Amendment demands less governmental justification than where a heightened privacy interest is involved. *Winston v. Lee*, 470 U.S. 753, 766 (1985); *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992).

In the present case, the court finds plaintiff's constitutionally protected right to privacy and bodily integrity

is clearly implicated.[15] Similar to the Fourth Amendment protection extended to the collection and testing of urine in *Skinner*, plethysmograph testing requires the physical involvement of arguably the most private part of the inmate's body, for the purpose of recording and monitoring the physiological disclosure of sensitive and revealing information about the inmate's sexual response.

Because the operation of IMPP 11-101 within the context of the SATP Program imposes consequences similar to prison disciplinary sanctions, the court finds sufficient compulsion for plaintiff to have standing to raise this constitutional claim. *See Lucero v. Gunter*, 17 F.3d 1347 (10th Cir. 1994) (standing to raise Fourth Amendment claim established by adverse disciplinary consequences attendant to inmate's refusal to undergo urinalysis testing).

The court thus turns to the government's need for the private information obtained in such testing, and the reasonableness of the testing procedure.

Because plaintiff is incarcerated, the court's examination is guided by the rational relationship test outlined by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, the Court held that a prison regulation infringing on a constitutionally recognized right of a convicted prisoner is considered valid only if the regulation is reasonably related to

[15] The court rejects plaintiff's alternative claim under the Fourteenth Amendment that the SATP Program at LCF violates his right to refuse medical treatment. In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court recognized that an inmate retains a significant liberty interest, protected under the Due Process Clause, from being subjected to the arbitrary and erroneous forceful administration of medication. However, the rehabilitative treatment protocol being challenged in the present case is clearly distinguishable in its scope and purpose from the forced administration of anti-psychotic drugs in *Harper* as a medical response to a threat of danger to the inmate and to others at the facility.

a legitimate penological interest. *Id.* at 89. This is a less restrictive standard than ordinarily applied to the review of alleged violations of constitutional rights. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). The *Turner* "reasonableness" standard attempts to reconcile the Court's "longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration." *Washington v. Harper*, 494 U.S. 210, 223-24 (1990).

In *Turner*, the court identified four factors to be considered in determining whether the prison policy in question is "reasonably related" to legitimate penological goals, or whether the policy reflected an "exaggerated response" to those concerns. 482 U.S. at 87. Courts have recognized that not all four factors are necessarily relevant to an inquiry in the context of the Fourth Amendment. *Dunn*, 880 F.2d at 1193 n. 3. *See* also *Michenfelder v. Sumner*, 860 F.2d 328, 331 n. 1 (9th Cir.1988); *Frink v. Arnold*, 842 F.Supp. 1184 (S.D. Iowa 1994), *aff'd*, 43 F.3d 673 (8th Cir.1994). Accordingly, the analysis of a prisoner's constitutional privacy claim has often centered on the first factor, which is whether a valid and rational connection exists between the regulation and the penological interest offered to justify the regulation.[16] The balancing test in *Wolfish* is used to guide that analysis. *Dunn*,

[16] Plaintiff argues the remaining *Turner* factors, which address whether reasonable alternatives exist that can both accommodate the prison's needs and protect an inmate's rights, should be examined as well, and contend the alternative available in this case is to allow testing without the compulsion operating under IMPP 11-101. However, *Dunn* instructs that "[o]nce a court has concluded that a prison search is not unreasonable, there is no infringement of a constitutional right, and thus the issue whether there is a possibility of 'accommodating' a prisoner's fourth amendment right by some other means would not arise." *Dunn*, 880 F.2d at 1194 n. 3.

880 F.2d at 1194 n. 3.; *Thompson v. Souza*, 111 F.3d 694, 699-700 (9th Cir.1997).

Here, the parties stipulate that the SATP Program at LCF is a clinical rehabilitative program. Rehabilitation is a legitimate penological objective. *See, O'Lone*, 482 U.S. at 348 ("limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives-- including deterrence of crime, rehabilitation of prisoners, and institutional security"). Thus the underlying reason for the SATP Program at LCF is legitimate.

Next, the intrusion into an inmate's right to bodily integrity is significantly mitigated in this case by the fact that SATP staff neither touch nor observe the inmate throughout the plethysmograph testing procedure. *Compare, Pierce v. Smith*, 117 F.3d 866, 875 (5th Cir.1997) (intrusiveness of search was minimal where urine sample was collected behind closed door and without monitor). The testing procedure is not videotaped and there is no threat of pain or harm to the inmate.

The court thereby finds the legitimate governmental interest in rehabilitation outweighs the intrusion inherent in the plethysmograph testing as it is conducted at LCF.[17]

The decisive and remaining inquiry is whether the treatment program itself bears a rational relationship to the rehabilitative purpose. *Dunn*, 880 F.2d at 1196. "[A]

[17] However, the collection of the responsive data from the plethysmograph testing is afforded minimal confidentiality. It is uncontroverted that plethysmograph test results are discussed in the group therapy sessions. There appears to be little attention to or justification for the disclosure of this sensitive and private information. *See e.g. Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) ("other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body"); *Skinner*, 489 U.S. at 617 (analysis of test data is further invasion of privacy interest).

regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 1194 (*quoting Turner*, 482 U.S. at 89-90).

Although penile plethysmograph testing is used in other sex offender treatment programs, the testing procedure has garnered only limited acceptance and credibility by the courts.[18] The reliability and usefulness of the testing outlined in the present case is further diminished by the DOC "incentive" program which does little to render an inmate's participation truly voluntary, and by the marginal training and expertise of the staff.

While the usefulness and reliability of the plethysmograph testing in the SATP Program at LCF may be strongly questioned, defendants' decision to employ the testing in the manner outlined in the record must be afforded broad deference unless the testing and use of the private information

[18] For evidentiary purposes in the courtroom, plethysmograph results have not been accepted as reliable enough for predictive or identification evidence in criminal cases, *see e.g., State v. Spencer*, 119 N.C.App. 662, 459 S.E.2d 812 (1995) (trial court properly excluded psychologist's testimony regarding plethysmograph testing, scientific community divided as to the reliability of the test to measure sexual deviancy), *rev. denied*, 341 N.C. 655, 462 S.E.2d 524 (1995), or in cases involving child custody or the termination of parental rights, *see e.g., In the Interest of A.V.*, 849 S.W.2d 393, 399 (Tex. App. 1993) (reservations noted regarding acceptance by scientific community of plethysmograph as valid indicator of sexual preference or disorder).

But see, State v. Riles, 135 Wash. 2d 326, 345, 957 P.2d 655, 664 (1998) (use and value of plethysmograph as treatment device recognized; testing provides useful information regarding the sexual arousal patterns of sex offenders, and data obtained can be used to assess baseline arousal patterns and therapeutic progress during treatment).

thereby obtained is devoid of probative and productive utility toward the stated rehabilitative purpose.[19]

Having considered the scope of the intrusion, the manner in which it is conducted, the justification for the procedure, and the place it is conducted, *Wolfish*, 441 U.S. at 559, the court finds the plethysmograph testing in the SATP Program at LCF intrudes upon plaintiff's constitutional right to privacy and bodily integrity, but finds defendants' governmental interest in rehabilitation outweighs plaintiff's right to be free from such intrusion. The court further finds the challenged testing procedure, and the related operation of "incentive" policy IMPP 11- 101, are both rationally related to the legitimate penological goal of rehabilitation of sex offenders, and reasonable enough to satisfy the review required under *Turner v. Safley*. Summary judgment is granted to defendants on plaintiff's Fourth Amendment privacy claim.

Pursuant to the court's Order dated April 23, 1996 (Doc. 94), the court enjoined defendants from coercing in any manner plaintiff's acceptance of or participation in SATP programming until the merits of plaintiff's claims were decided. The court continues this injunctive relief pending the final outcome of any appeal in this matter, or the termination of the time for filing an appeal.

IT IS THEREFORE BY THE COURT ORDERED that summary judgment is granted to plaintiff on plaintiff's Fifth Amendment claim.

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[19] The prison context of plaintiff's claims is clearly decisive. Compare *Harrington v. Almy*, 977 F.2d 37 (1st Cir.1992), in which a suspended police officer challenged the city manager's demand that the officer undergo plethysmograph testing as a condition of reinstatement. The Circuit Court reversed the grant of summary judgment to the defendants, noting the invasive and offensive nature of the plethysmograph testing, the unreliability of the procedure, and the lack of evidence that less intrusive means were not available. *Id.* at 44.

IT IS FURTHER ORDERED that summary judgment is granted to defendants on plaintiff's privacy claim.

IT IS FURTHER ORDERED that the temporary injunction granted to plaintiff in this matter (Doc. 94) is continued until the judicial disposition of plaintiff's claims are finalized through appellate review or until the time for seeking such appellate review has expired.

GRANTED

No. 00-1

In The

Supreme Court of the United States

DAVID R. MCKUNE, Warden and CHARLES SIMMONS, Secretary, Kansas Department of Corrections,

Petitioners,

v.

ROBERT G. LILE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, upon an inmate's invocation of his Fifth Amendment rights, a decision to transfer that inmate to maximum security and impose corresponding sanctions constitutes compulsion under the Fifth Amendment?

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STATEMENT OF THE CASE[1]

a. Nature of the Case

Mr. Lile was convicted in 1983 of kidnaping, rape, and aggravated sodomy. He pled not guilty and still maintains that his conduct with the victim was consensual. He is incarcerated at the Lansing (Kansas) Correctional Facility ("LCF"), where he is serving a life sentence. (Pet. App. at 33-34a).

When Mr. Lile entered LCF, prison officials did not require him to take part in sex offender therapy. However, in 1994, prison officials notified Mr. Lile that they were requiring him to take part in the Department of Corrections' Sexual Abuse Treatment Program ("SATP"). As part of their efforts, officials added this program to Mr. Lile's inmate program agreement ("IPA"). (Pet. App. at 34a).

Participants in SATP are required to sign an "Admission of Guilt"[2] form and to provide a detailed sexual history, including any uncharged sexual offenses. Petitioners then utilize polygraph testing to determine the veracity of the participant's statements, and they also employ penile plethysmograph testing for treatment purposes. These testing results are then discussed in group therapy sessions. (Pet. App. at 34-35a).

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[1] Mr. Lile is content to proceed with Petitioners' statement as to the opinions below, jurisdiction, and statutes involved in this appeal. *See* Sup. Ct. R. 24.2.

[2] After Mr. Lile filed suit in the United States District Court for the District of Kansas, Petitioners changed the title of this form to "Admission of Responsibility." (Pet. App. at 34a).

In 1995, the Kansas Department of Corrections revised its internal management policies and procedures ("IMPP"). (Pet. App. at 34a). IMPP compels inmates to participate in required prison programming. In the instance of SATP, failure to complete the program results in a mandatory transfer in custody to maximum security and a concomitant implementation of sanctions. These sanctions include, but are not limited to: (1) limiting visitation to clergy, counsel, and immediate family; (2) limiting the amount of personal property an inmate may keep in his cell; and (3) limiting an inmate to $0.60 per day in prison pay.[3] (Pet. App. at 35a). Moreover, stay in maximum security custody exposes an inmate to a greater threat of personal harm. (Pet. App. at 18a).

b. District Court

Mr. Lile agrees with Petitioners' recitation of the District Court proceedings, but would add one point. In granting Mr. Lile summary judgment on his Fifth Amendment claim, the District Court held that, consistent with the Fifth Amendment, Petitioners still could continue to run SATP in its present form as long as they gave Mr. Lile immunity for any incriminating statement which he disclosed. (Pet. App. at 45a).

[3] These same sanctions are imposed upon an inmate convicted by the prison of theft, arson, or drug possession. (Pet. App. at 24a).

c. The Tenth Circuit

Mr. Lile agrees in part with Petitioners' interpretation of the Tenth Circuit's opinion but would offer additional clarification.

In discussing the Tenth Circuit's determination that the penalties involved in this case implicated the Fifth Amendment, Petitioners state: "In reaching that conclusion, the [Tenth Circuit] emphasized that a critical factor is that refusal to participate in the SATP, 'standing alone,' results in the loss of privileges." (Pet. at 5, citing to Pet. App. at 19a).

However, the Tenth Circuit did not state that the *refusal to participate in the program* resulted in the loss of privileges. Rather, the court noted that: "Plaintiff's *refusal to submit to the interrogation* – to disclose the required information about his sexual history – standing alone, would certainly result in the transfer to [maximum security] and the corresponding loss and restrictions of many privileges." (Pet. App. at 19a) (emphasis supplied).

Similarly, Petitioners suggest that the Tenth Circuit determined that SATP was not truly "voluntary" because sanctions automatically followed Mr. Lile's "refusal to participate in the SATP program." (Pet. at 5). Again, Petitioners misstate the Tenth Circuit's ruling. The Tenth Circuit concluded that participation in SATP was not voluntary because Petitioners "would impose sanctions solely because Plaintiff wishes to remain silent and invoke his Fifth Amendment right against self-incrimination. . . . " (Pet. App. at 20a). This distinction may seem minor; however, it is important to note that the Tenth Circuit held that it was Mr. Lile's *invocation of his Fifth*

Amendment rights – not an overall refusal to participate in SATP – that triggered Petitioner's sanctions.

REASONS WHY THE PETITION SHOULD BE DENIED

Respondent Robert G. Lile ("Lile") respectfully requests this Court deny the Petition for a Writ of Certiorari seeking review of the United States Court of Appeals for the Tenth Circuit's affirmation of the United States District Court for the District of Kansas' grant of summary judgment for Mr. Lile.

The issue of sexual abuse and treatment is one that demands attention from the State of Kansas. Mr. Lile is willing to take part in SATP. However, in order to do so, he must admit he committed the crime for which he is incarcerated. If he does make this admission, he faces potential charges for perjury. He must also catalog all uncharged sexual offenses. If he does so, prison officials are required under state law to report these crimes. He must submit to polygraph examinations to gauge the veracity of his admissions. All results and admissions are then discussed in group sessions.

Mr. Lile's invocation of his Fifth Amendment privilege against self-incrimination will result in Petitioners' transfer of Mr. Lile to maximum security, stripping him of his ability to work certain jobs and have visitation with anyone outside of counsel, clergy, and immediate family, while at the same time exposing him to a more dangerous environment. These same sanctions are imposed upon inmates when an inmate is convicted by the prison of

theft, arson, drug use or possession, and assault or when a prosecutor files felony charges against an inmate.

This Court should not grant Petitioners' request for review. The Tenth Circuit's decision was correct. Moreover, there is nothing unique or complicated about this case. Mr. Lile faces an appreciable risk of incrimination if forced to admit guilt and catalog his uncharged crimes. Further, Petitioners punish him for invoking his constitutional rights.

Neither the District Court nor the Tenth Circuit's decision was so sweeping as to eliminate SATP and Petitioners' interest in rehabilitating sex offenders. Petitioners can continue to operate SATP – and even penalize those who refuse to take part – as long as they give immunity for those incriminating statements made during treatment.

A. The Tenth Circuit followed this Court's precedent in determining that the SATP compels Mr. Lile to incriminate himself.

Mr. Lile agrees that his move to maximum custody and the corresponding sanctions he faces do not involve liberty interests. However, as stated by the Tenth Circuit and not disputed by Petitioners, this Court has repeatedly found Fifth Amendment violations without engaging specifically in a liberty interest review. *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801, 808-09 (1977); *Spevack v. Klein*, 385 U.S. 511, 516 (1967); *Lefkowitz v. Turley*, 414 U.S. 70, 82 (1973); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 283-85 (1968); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967);

Gardner v. Broderick, 392 U.S. 273, 278-79 (1968). As the Court stated in *Spevack*: " 'Penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, the imposition of *any sanction* which makes the assertion of the Fifth Amendment privilege 'costly.' " *Spevack*, 385 U.S. at 515 (emphasis added).

The Tenth Circuit followed this Court's rulings in determining that SATP violated Mr. Lile's Fifth Amendment rights. As such, this Court should not grant Petitioners' request for review.

Petitioners also suggest that, because this Court did not find Fifth Amendment violations in other cases, the Tenth Circuit was wrong in finding one here. Again, the Tenth Circuit properly distinguished this Court's rulings in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), and *Baxter v. Palmigiano*, 425 U.S. 308 (1975). In *Woodard*, after noting that drawing adverse inferences for silence in a civil proceeding did not violate the Fifth Amendment, the Court stated that "[i]t is difficult to see how a voluntary interview could 'compel' respondent to speak." *Woodard*, 523 U.S. at 286. The Tenth Circuit properly distinguished *Woodard*, agreeing with this Court that the clemency interview in *Woodard* was voluntary and that "no separate and distinct substantial or potent consequences were imposed" as they are in Mr. Lile's situation. (Pet. App. at 21a). The dramatic language of *Searcy v. Simmons*, 97 F. Supp. 2d 1055, 1059 (D. Kan. 2000) (Pet. at 9), notwithstanding, Mr. Woodard's clemency did not hinge on whether he participated in clemency review. (Pet. App. at 21a). In the present case, the sanctions Petitioners would impose come as a direct result of Mr. Lile's invocation of his Fifth Amendment rights.

Similarly, with respect to *Baxter v. Palmigiano*, 425 U.S. 308 (1975), the Tenth Circuit correctly noted that, in Mr. Lile's situation, the penalties he faced were not as speculative as the possible repercussions in *Baxter*. Again, in Mr. Lile's case, punishment *automatically* results when he invokes his Fifth Amendment rights. (Pet. App. at 19a).

Moreover, despite Petitioners' repeated suggestions (Pet. at 10-11), the Tenth Circuit did not suggest it was Mr. Lile's *refusal* to enter SATP that triggered his sanctions. Rather, it was his *invocation* of his Fifth Amendment rights: "[W]e hold that there is a 'reasonable basis for concluding that [Defendants] attempted to attach an impermissible penalty to the exercise of the privilege against self-incrimination.' " (Pet. App. at 25a-26a (quoting *Minnesota v. Murphy*, 465 U.S. 420, 437 (1984)). The District Court made a similar finding: "[O]peration of IMPP 11-101 clearly presents such a costly burden to plaintiff's exercise of his rights under the Fifth Amendment." (Pet. App. at 44a). Any attempt to suggest that Petitioners punish Mr. Lile simply because he seeks to avoid SATP are incorrect and certainly should not require review by this Court.

B. The Tenth Circuit's decision does not conflict with other courts' decisions to the extent that this Court should review it.

Petitioners identify four cases which they believe conflict with the Tenth Circuit's decision. Two of those cases, *Tedder v. Francke*, 931 F.2d 897, 1991 WL 65497 (9th Cir. Apr. 24, 1991) (unreported), and *Guilkey v. Holden*, 865

F.2d 258, 1988 WL 134526 (6th Cir. Dec. 16, 1988) (unreported), do state that an inmate has no liberty interest in discretionary parole. This is not in dispute in the present case, nor could it be given the previous rulings by this Court. *See, e.g., Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). However, these cases are not in conflict with the Tenth Circuit's decision here.

In *Tedder*, the Ninth Circuit Court of Appeals rejected plaintiff's Fifth Amendment claim, not under a liberty interest analysis, but because "[a]ny admissions that he would make would be privileged" under state law. *Tedder*, 1991 WL 65497, at **2. "An inmate patient's disclosures to a treating therapist are unavailable to the state or federal government to use in a court proceeding. If he chose to undergo the treatment, [plaintiff] would not be providing the state with incriminating evidence." *Id.*

Further, in *Guilkey*, the Sixth Circuit Court of Appeals did state that Kentucky's parole statute and its sex offender treatment program did not create a liberty interest protected by due process. The court did not, however, state that this lack of liberty interest doomed plaintiff's Fifth Amendment claim. On the contrary, plaintiff's Fifth Amendment claim extinguished because "plaintiff's admission would be a privileged communication not subject to disclosure in any civil or criminal proceeding." *Id.* at **1.

Similarly, the decisions in *Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412 (1998), and *Chambers v. Bachicha*, 39 F.3d 1191, 1994 WL 596702 (10th Cir. Oct. 28, 1994) (unreported), also do not demand review of Mr. Lile's case.

While *Bankes* found no compulsion under the Fifth Amendment after a liberty interest analysis, the Tenth Circuit's decision in this case is the better one. The Tenth Circuit found no evidence that this Court had ever engaged in a liberty interest analysis when examining a Fifth Amendment claim and determined that this Court's approach was better suited for Mr. Lile's claim. (Pet. App. at 14a).

As for *Chambers*, the Tenth Circuit here decided to revisit a terse discussion from this unpublished decision that brushed upon the Fifth Amendment/liberty interest issue and decided that, because this Court had never utilized a liberty interest analysis before for Fifth Amendment claims, it need not do the same. Such a correction does not create the conflict in the circuit courts on which Petitioners rely for this Court's review.

C. The *Turner* "reasonableness" standard of review applies in the prison context; that the Tenth Circuit employed the four-factor test in determining whether Petitioners met that standard is not sufficient to merit review.

The Tenth Circuit did not err when it employed the "reasonableness" standard of review set forth in *Turner v. Safley*, 482 U.S. 78 (1987), in determining that SATP violated Mr. Lile's Fifth Amendment rights. This approach is consistent with this Court's ruling in *Turner* that this standard should be used to determine whether a prison regulation is invalid when it interferes with an inmate's constitutional rights, even if those rights are fundamental. *See id.* at 89; *see also Washington v. Harper*, 494 U.S. 210,

224 (1990) ("We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights.").

However, it appears that Petitioners seek review to determine if the Tenth Circuit's use of the four-factor analysis set forth in *Turner* is appropriate for Fifth Amendment claims. Mr. Lile agrees that this Court has never stated that the four-factor test was a *required* analysis under *Turner*, but it has suggested that what *Turner* did, in part, was "identify several factors relevant to this reasonableness determination." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987).

Working from the premise that a court can turn to the *Turner* "reasonableness" standard when prison policies affect constitutional rights, the Tenth Circuit used the four-factor analysis to determine whether SATP met that "reasonableness" standard. The court only had to determine that SATP passed the *Turner* "reasonableness" standard of review. That it did more and turned to the four-factor test suggested by this Court to assist that determination does not warrant this Court's attention.[4]

[4] Since this Court decided *Turner* in 1987, it has turned to the *Turner* factors in two instances where prison regulations impacted the constitutional rights of inmates. *See O'Lone*, 482 U.S. at 350-51; *Washington*, 494 U.S. at 224-226.

D. Although sex offender treatment is important, the framework suggested by the lower courts permits Petitioners to meet all of its stated goals for SATP.

Petitioners feel handcuffed to provide the curative benefits of SATP unless they can rely on their system of sanctions to motivate inmates. They suggest that SATP cannot work unless participants can "overcom[e] denial" and be open about their sex offenses. Their treatment programs have been successful, but need to rely upon a system of "strong incentives" in order to get inmates to participate. (Pet. at 14-15).

However, there is little reason for the Court to intervene to provide Petitioners a workable solution on policy grounds. The *only* manner in which the lower courts' rulings alter Petitioners' ideal structure of SATP is to give immunity for incriminating statements made. As Petitioners are motivated by an interest in getting sex offenders to participate with candor and honesty (while being able to penalize them for refusing treatment), the District Court and Tenth Circuit – following precedent from this Court – already have provided such framework to Petitioners. By giving immunity for any incriminating statements, Petitioners will secure the frank discussion required for the treatment of sex offenders. Further, providing immunity would enable Petitioners to leave in place their system of sanctions for those who refuse. Thus, Petitioners could move closer to their goals of rehabilitation while maintaining leverage to punish those who choose not to participate.

For example, Mr. Lile agrees that participation in sex offender treatment is an important issue for prison officials, and he is willing to take part in such treatment if given immunity for any incriminating statements. Under this framework, Petitioners would secure open discussion from Mr. Lile on his sexual history, enabling them to provide sex offender treatment to him. But, if Mr. Lile decided he did not want to participate in SATP, Petitioners would still be equipped with the ability to sanction Mr. Lile by sending him to maximum custody. There is little reason for the Court to grant Petitioners' writ on this point; their goals of rehabilitation can be met under the present rulings of the lower courts.

CONCLUSION

For the foregoing reasons, Mr. Lile respectfully requests that this Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

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March 2001

JUL 11 2001

Supreme Court, U.S.
FILED
JUL 11 2001
CLERK

No. 00-1187

In The

Supreme Court of the United States

DAVID R. McKUNE, Warden; CHARLES SIMMONS, Secretary, Kansas Department of Corrections,

Petitioners,

v.

ROBERT G. LILE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed January 22, 2001
Certiorari Granted May 14, 2001

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3:95cv3266 Lile v. McKune, et al

MTNDDL

6/28/95	1	MOTION by Plaintiff to proceed in forma pauperis (cam)
6/28/95	2	COMPLAINT (cam)
		* * *
3/1/96	77	MOTION by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels (cam) [Entry date 03/04/96]
3/1/96	78	MEMORANDUM in support re: motion by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels [77-1] (cam) [Entry date 03/04/96]
3/1/96	79	FIRST AMENDED COMPLAINT [2-1] by plaintiff terminating defendant Allen Ohlstein, defendant Jane Doe, defendant John Doe, defendant Barbara Owens, defendant William Cummings, defendant Raymond (nmi) Roberts, defendant John Callison, defendant Rudy Stupar (cam) [Entry date 03/04/96]
		* * *
3/18/96	83	RESPONSE by defendant David R McKune, defendant Charles Simmons to motion by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels [77-1] (cam) [Edit date 03/18/96]

3/18/96	85	ANSWER - by defendant David R McKune & defendant Charles Simmons to 1st amended complaint [79-1] (cam) [Edit date 03/28/96]
3/18/96	84	MEMORANDUM in response by defendants McKune & Simmons to pltf's motion for temporary injunction re: [83-1] (cam) [Entry date 03/27/96]

* * *

3/27/96	92	REPLY by plaintiff to response to motion by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels [77-1] (cam) [Entry date 3/29/96]
3/29/96	93	MINUTE SHEET of Hearing on Motion for Preliminary Injunction at Topeka, KS, before Hon. DES: (Lyon, CSR) Taking under advisement on 3/30/96 the motion by plaintiff for temporary injunction referred to Senior Judge Dale E. Saffels [77-1] (cam)
4/23/96	94	ORDER ENTERED: by Senior Judge Dale E. Saffels granting motion by plaintiff for temporary injunction [77-1]. Pltf to continue on waiting list for SATP programming at Lansing Correctional Facility, & defts enjoined from coercing in any manner pltf's acceptance of or participation in SATP programming, until merits of pltf's claims have been decided (cc: all counsel) (cam)

* * *

1/10/97	130	MOTION by defts Charles Simmons and David R. McKune for summary judgment, or, in the alternative, judgment on the pleadings; referred to Senior Judge Dale E. Saffels (ms) [Entry date 01/13/97
1/10/97	131	MEMORANDUM in support of motion by defts Charles Simmons and David R. McKune for summary judgment, or, in alternative, judgment on the pleadings; referred to Senior Judge Dale E. Saffels [130-1-(ms) [Entry date 01/13/97]
1/10/97	132	EXHIBITS filed by defendants re: [130-1] motion by defts Charles Simmons and David R. McKune for summary judgment, or, in the alternative, judgment on the pleadings; referred to Senior Judge Dale E. Saffels (ms) [Entry date 01/13/97]
1/10/97	133	MOTION by pltf Robert G. Lile for summary judgment; referred to Senior Judge Dale E. Saffels (ms) [Entry date 01/14/97]
1/10/97	134	MEMORANDUM by plaintiff Robert G. Lile in support of motion by pltf Robert G. Lile for summary judgment; to Senior Judge Dale E. Saffels [133-1] (ms) [Entry date 01/14/97]

* * *

1/28/97	139	MOTION by pltf for summary judgment; referred to Senior Judge Dale E. Saffels (ms) [Entry date 01/30/97]
1/28/97	140	MEMORANDUM by plaintiff Robert G Lile in support of motion by pltf for summary judgment; referred to Senior Judge Dale E. Saffels [139-1] (ms) [Entry date 01/30/97]

1/29/97 137 PRE-TRIAL ORDER ENTERED by Senior Judge Dale E. Saffels: Terminating case referral of Magistrate Judge Ronald Newman: Discovery is complete. Pending motions are defts' motion for summary judgment (Doc. 130) pltf's motion for summary judgment (Doc. 133) & Pltf's motion to extend (Doc. 135). Court trial in Topeka, KS. Ready for trial after 1/10/97 and disposition of any pending motions. ETT: 2 days. Prospects for settlement are poor. (cc: all counsel) (mb)

* * *

2/3/97 141 RESPONSE by plaintiff re: [131-1], defts' memorandum in support of summary judgment (ms) [Entry date 02/05/97]

2/3/97 142 RESPONSE by defendants to motion by pltf for summary judgment, [139-1] and [133-1]; referred to Senior Judge Dale E. Saffels (ms) [Entry date 02/05/97]

2/19/97 143 REPLY by defendants to plaintiff's response to defts' memorandum in support of motion for summary judgment; referred to Senior Judge Dale E. Saffels [130-1] (do) [Entry date 02/20/97]

2/20/97 145 REPLY by plaintiff to defts' response to motion by pltf for summary judgment; referred to Senior Judge Dale E. Saffels [133-1] [139-1] (ms) [Entry date 02/25/97]

2/21/97 144 RESPONSE by defendant re: [140-1] pltf's memorandum in support of summary judgment concerning fourth and fourteenth amendment rights and polygraph and plethysmograph examinations (ms) [Entry date 02/24/97]

3/12/97 146 REPLY by plaintiff to defts' response to motion by pltf for summary judgment; referred to Senior Judge Dale E. Saffels [139-1] (ms) [Entry date 03/14/97]

* * *

1/8/98 151 MINUTE SHEET of motions hearing held at Topeka before Judge Saffels: – Counsel argues summary judgment motions (doc #130, 133, 139) and they are taken under advisement by the court. Order will be issued. Court Reporter: Lyon (do) [Entry date 01/09/98]

* * *

9/16/98 153 MEMORANDUM AND ORDER by Senior Judge Dale E. Saffels: Summary judgment is granted to plaintiff on his Fifth Amendment claim; summary judgment is granted to defendants on plaintiff's privacy claim. The temporary injunction granted to plaintiff in this matter is continued until the judicial disposition of plaintiff's claims are finalized through appellate review or until the time for seeking such appellate review has expired. [139-1] [133-1] [130-1] 25 pages (cc: all counsel) (do)

9/16/98 154 JUDGMENT ON DECISION BY THE COURT ENTERED BY THE CLERK: re [153-1]: Summary judgment is granted to plaintiff on Fifth Amendment Claim; summary judgment is granted to defts on pltf's privacy claim. Temporary injunction granted to pltf in this matter is continued until the judicial disposition of pltf's claims are finalized through appellate review or until the time for seeking such appellate review has expired; dismissing case (cc: all counsel) (do)

* * *

10/13/98 156 NOTICE OF APPEAL by defendants David R. McKune, and Charles Simmons from Dist. Court Decision filed 9/16/98 re: [154-2], re: [153-1] (cc: all counsel, 10CCA) (do) [Entry date 10/14/98]

Case Nos. 98-3292 and 98-3294

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT G. LILE,
Plaintiff/Appellee/Cross-Appellant,

vs.

DAVID R. McKUNE, Warden and **CHARLES SIMMONS,** Secretary of Corrections, Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Kansas

APPENDIX
Vol. 1

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Copies of Memorandum regarding Summary Judgment do not contain the supporting exhibits.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 98-3292 and 98-3294

ROBERT G. LILE,

Plaintiff/Cross-Appellant/Appellee

vs.

DAVID R. McKUNE, Warden and CHARLES SIMMONS, Secretary of Corrections,

Defendants/Appellants/Cross-Appellees

On Appeal from the United States District Court
for the District of Kansas
Case No. 95-3266-DES
The Honorable Dale E. Saffels

SUPPLEMENTAL APPENDIX FOR PLAINTIFF/ CROSS-APPELLANT/APPELLEE

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SUPPLEMENTAL APPENDIX FOR PLAINTIFF/ CROSS-APPELLANT'S BRIEF

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[1] Defendants did not include one of Plaintiffs' Memorandum in Support of His Motion for Summary Judgment (the memorandum regarding Mr. Lile's privacy claim). As with Defendants, Mr. Lile has not included supporting exhibits to this memorandum. However, Mr. Lile has included the underlying exhibits supporting his Statement of Facts in this Appendix.

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EXHIBIT 8

Kansas Department of Corrections

[LOGO] INTERNAL MANAGEMENT POLICY AND PROCEDURE

SECTION NUMBER 11-101

PAGE NUMBER 1 of 8

SUBJECT:
DECISION MAKING: Offender Privileges and Incentives

POLICY

The Kansas Department of Corrections shall implement a comprehensive system of earnable offender privileges which will provide an effective means of managing the offender population and reinforcing constructive behavioral changes in offenders.

DEFINITIONS

Post Incarceration Supervision: The supervision of offenders for any type of release from a KDOC facility, to include release to parole, conditional release, and post release supervision.

Condition violator (CV) unit: Specialized facility or unit that houses inmates who have violated conditions of post incarceration supervision but have not been convicted of a new offense.

Self-help program or activity: Those programs and activities listed in Attachment A.

Exempt Canteen/Property Items: Television, typewriter, radio/cassette-recorder, fans and tennis shoes.

PROCEDURES

I. Earnable Privileges

A. The following earnable privileges are included in the Offender Privileges and incentive Level System:

1. TV Ownership;
2. Handicrafts;
3. Participation in organizations and formalized activities, except as indicated below;
   a. The offender's incentive level status shall not be used as a factor in consideration of placement into a formalized education or treatment program or service or participation in a self-help program or activity.
4. Use of outside funds;
5. Canteen expenditures;
6. Property;
7. Incentive Pay; and
8. Visitation.

II. Incentive Levels

A. Earnable privileges shall be grouped into four (4) levels for incarcerated offenders. These levels are:

1. Intake Level;
2. Level I;

3. Level II; and
4. Level III.

B. Earnable privileges shall be grouped into two (2) levels for offenders on post incarceration supervision. These levels are:

1. Level IV; and
2. Level V.

C. Except as provided below, earnable privileges for intake Level through Level III shall be administered in accordance with Attachment A.

1. Inmates participating in a KDOC work release program for reintegration at Wichita Work Release Facility (WWRF) or Hutchinson Correctional Facility (HCF) Work Release Unit shall be eligible to earn privileges in accordance with applicable general orders.
2. Inmates participating in the mental health programs at LCMHF and the maximum female unit at TCF shall be eligible to earn privileges in accordance with applicable general orders.
3. Inmates released from Larned State Security Hospital (LSSH) or Chemical Dependency Rehabilitation Program (CDRP) after receiving mental health or substance abuse treatment shall have their incentive levels determined by the unit team upon their return to a KDOC facility.
   a. When computing the proper incentive level, the unit team shall give the inmate credit for time served if the

inmate has completed the treatment program.

4. Parolees participating in a KDOC pre-revocation program shall be eligible to earn privileges in accordance with applicable general orders.

D. Earnable privileges for Levels IV and V shall be administered in accordance with relevant Chapter 14, Parole Services IMPPs.

III. Progression Through Levels

A. Intake Level

1. Upon admission to the Department at an intake facility, offenders shall be assigned to the Intake Level.

a. While at the Intake Level, inmates are limited to up to $5.00 per pay period in canteen expenditures for those items identified in section V.B.1.a. of this IMPP and shower shoes.

2. Except as provided in section III.A.2.c. below, completion of the assessment and evaluation process at the intake facility and transfer to a facility for housing shall be considered successful completion of the Intake Level.

a. Offenders transferred to a facility for housing after refusing to complete the assessment and evaluation process shall remain at the Intake Level until completion of the assessment and evaluation process.

b. Offenders convicted of a class I or class II disciplinary offenses while at

the intake facility must remain disciplinary conviction free through the first regularly scheduled 120 day review following admission in order to be promoted to Level I.

c. Offenders returned to prison as violators of supervised release with no new sentence shall remain at the Intake Level until such time as orientation is completed at one of the condition violator (CV) units.

B. Level I

1. Inmates successfully completing the assessment and evaluation process at intake facility shall be promoted to Level I upon placement at another facility.

2. To complete Level I, an inmate must remain free of class I and class II disciplinary reports and demonstrate a willingness to participate in recommended programs and/or work assignments for a full review cycle (minimum of 120 days).

a. Inmates returned to Level I for a second time (i.e., the inmates' third time on Level I) or a subsequent time must remain free of class I and class II disciplinary reports and demonstrate a willingness to participate in recommended programs and/or work assignments for two (2) full review cycles in order to promote to Level II.

C. Level II

1. Upon successful completion of Level I, the inmate shall be promoted on Level II.

2. Requirements for successful completion of Level II are the same as for Level I, as outlined in section III.B.2. of this IMPP.

D. Level III

1. Upon successful completion of Level II, the inmate shall be promoted to Level III.

2. An inmate shall remain on Level III provided he/she does not demonstrate inappropriate behavior as outlined in section IV of this IMPP.

E. Level IV

1. Upon release to post incarceration supervision, the offender shall be promoted to Level IV.

2. To complete Level IV, an offender shall:

a. Have no positive urinalysis for six (6) months;

b. Have actively participated in or completed required/recommended programs;

c. Not have incurred arrest or convictions (excluding minor misdemeanor convictions which are traffic/parking related); and

d. Have made scheduled payments toward restitution and court costs as instructed by the parole officer, and shall have paid supervision fees on schedule.

F. Level V

1. Upon successful completion of Level IV, the offender shall be promoted to Level V.

2. An offender shall remain on Level V provided he/she does not violate any terms or conditions outlined in section III.E.2. of this IMPP.

G. The offender shall not advance to another incentive level if the offender has a pending disciplinary action. The decision as to whether the offender moves forward or backwards, or remains stationary, on offender privileges and incentives level system shall be based upon the disposition of the disciplinary action.

1. An appeal shall not preclude movement.

IV. Reductions in Level

A. An inmate shall be reduced one (1) incentive level for any of the following:

1. Two (2) or more disciplinary reports during a single 120 day period which result in a conviction for either a class I or class II offense;

2. Any disciplinary conviction, not listed in section IV.B.4., which results in a loss of custody.

B. An inmate shall be automatically reduced to Level I for any of the following:

1. Termination from a work or program assignment for cause;

2. Refusal to participate in recommended programs at the time of placement;

3. Offenses committed in which a felony charge is filed with the district or county prosecutor;

4. Disciplinary convictions for:

a. Theft (KAR 44-12-203);

b. Being in a condition of drunkenness, intoxication, or a state of altered consciousness (KAR 44-12-311);

c. Use of stimulants, sedatives, unauthorized drugs, or narcotics, or the misuse, or hoarding of authorized or prescribed medication (KAR 44-12-312);

d. Sodomy, aggravated sodomy, or aggravated sexual act (KAR 44-12-314);

e. Riot or incitement to riot (KAR 44-12-319);

f. Arson (KAR 44-12-322);

g. Assault (KAR 44-12-323);

h. Battery (KAR 44-12-324);

i. Inmate Activity (limitations) (section c of KAR 44-12-325);

j. Sexual Activity (KAR 44-12-326);

k. Interference with Restraints (KAR 44-12-327);

l. Relationships with Staff (KAR 44-12-328);

m. Work Performance (section a of KAR 44-12-401a); or

n. Dangerous Contraband (KAR 44-12-901).

C. Inmates may be placed on restriction by the disciplinary board without a level reduction. Upon serving the restriction, the offender's

privileges shall be restored commensurate with his/her incentive level.

D. Except as provided below, offenders on post release supervision shall be reduced from Level V to Level IV for violation of terms and conditions outlined in section III.E.2. of this IMPP.

1. Offenders returned to prison as condition violators with no new sentence shall return to intake Level as provided in section III.A.2.c. of this IMPP.

E. Except as indicated below, property items not authorized at the incentive level to which the inmate is reduced shall be removed from the facility in accordance with the provisions of IMPP 12-120.

1. Exempt canteen/property items, per IMPP 12-120, which includes but are not limited to sound equipment and large appliances, authorized at incentive Level II and III shall be stored upon the offenders first return to Level I. Such items shall be removed from the facility in accordance with the provisions of IMPP 12-120 at the inmate's expense in the following situations:

a. The inmate is returned to Level I for a second or subsequent time; or,

b. The inmate is returned to Level I and fails to advance to Level II at the earliest possible review or opportunity.

2. Offenders reduced from Level III to Level II may retain in-cell handicraft materials and supplies purchased while on Level III.

F. Upon an offenders return to Level I, property items allowed under the provisions of IMPP 12-120 Section X.B. shall be removed from the facility in accordance with established policy.

G. If an inmate's incentive level is reduced during a payroll period, canteen expenses for the entire period shall not exceed that which is authorized by the incentive level to which the inmate shall be reduced.

1. If at the time the inmate is reduced to a lower incentive level the inmate has already spent or exceeded the maximum amount allowed under the reduced incentive level, the inmate shall not be permitted to spend any additional funds.

H. An inmate eligible to earn incentive pay who refuses to participate in a job assignment shall be precluded from access to the canteen, except for purchase of approved items.

V. Inmates Confined in Administrative, or Disciplinary Segregation or Assigned Restriction

A. Administrative Segregation

1. In accordance with the provisions of KAR 44-14-306, inmates confined in administrative segregation shall be eligible, as much as possible, to earn and maintain privileges in the same amount and manner as any other inmate in the general population.

B. Disciplinary Segregation

1. Inmates confined in disciplinary segregation shall not have access to privileges, except as described below:

a. Canteen expenditures, as authorized by the facility warden but, if authorized by the facility warden, not to exceed $10.00 per payroll period for the purchase of the following items only.

1) Shampoo and approved hair care products listed as allowable property in IMPP 12-120;

2) Denture adhesive creme or powder;

3) Creme or stick deodorant;

4) The following writing supplies:

a) Stamps (not to exceed 10);

b) Writing paper (not to exceed 1 pad);

c) Envelopes (not to exceed 10); and

5) Feminine hygiene products listed as allowable property in IMPP 12-120 (females only).

b. Upon release from disciplinary segregation, the inmate shall return to one (1) incentive level below that which he or she was at prior to placement into disciplinary segregation.

c. Inmate assigned to restriction shall be limited to privileges in accordance with applicable regulations.

1) Canteen expenditures shall be limited to the dollar amount and

items specified in section V. B. 1. a. of this IMPP.

VI. Transition

A. All offenders, with the exception of condition violators with no new sentences, transferred from the intake facility upon completion of assessment and evaluation prior to January 1, 1996, shall be granted Level III privileges.

1. Such offenders shall be subject to the provisions of this IMPP and may be reduced in incentive level in accordance with section IV.

2. Condition violators with no new sentences housed at a designated KDOC condition violator unit shall remain on the incentive level they were at prior to January 1, 1996.

B. All offenders held in disciplinary segregation on January 1, 1996, for convictions on rule violations occurring prior to January 1, 1996, shall be granted Level III privileges upon release.

1. Any offenders placed in disciplinary segregation after January 1, 1996, for conviction of a rule violation occurring prior to January 1, 1996, shall be granted Level III privileges upon release.

VII. Monitoring of Offender Incentive Level

A. The assigned unit team counselor or parole officer shall be responsible for ensuring that the incentive level entered into the computerized database reflects the offenders current status.

VIII. Program Monitoring

A. The Deputy Secretary of Facility Management and Deputy Secretary of Community and Field Services, or their designees, shall annually review the Offender Privileges and Incentive Level System's effectiveness in managing the offender population and reinforcing constructive behavioral changes in offenders.

B. A report of findings shall be provided to the Secretary of Corrections annually on August 1.

NOTE: The policy and procedures set forth herein are intended to establish directives and guidelines for staff and offenders and those entities who are contractually bound to adhere to them. They are not intended to establish State created liberty interests for employees or offenders, or an independent duty owed by the Department of Corrections to either employees, offenders, or third parties. This policy and procedure is not intended to establish or create new constitutional rights or to enlarge or expand upon existing constitutional rights or duties.

REPORTS REQUIRED

Name/Type of Report	By Whom/To Whom	Due
Program Monitoring Report of Findings	Deputy Secretary of Facility Management and Deputy Secretary of Community and Field Services, or their designees/ Secretary of Corrections	August 1

REFERENCES

KAR 44-7-104, 44-12-203, 44-12-311, 44-12-312, 44-12-314, 44-12-319, 44-12-322, 44-12-323, 44-12-324, 44-12-325, 44-12-326, 44-12-327, 44-12-328, 44-12-401, 44-12-901, 44-12-1001 IMPP 04-108, 10-109, 10-113, 10-133, 12-120

ACO 2-3C-01

ACI 3-4214, 3-4215, 3-4263, 3-4280, 3-4407, 3-4442,

FCWC 11182

ATTACHMENTS

Offender Privileges and Incentives Level System, 1 page

Approved By:

/s/ Charles Simmons

Secretary of Corrections

Original Date Issued: 01-01-96

Current Amendment Effective: 01-01-96

Replaces Amendment Issued: N/A

OFFENDER PRIVILEGES AND INCENTIVES LEVEL SYSTEM
(For All Inmates Except Work Release Participants)

LEVEL	TV OWNERSHIP	HANDICRAFTS	ORGANIZATIONS/ FORMALIZED ACTIVITIES	LIMITATION ON OUTSIDE FUNDS	CANTEEN EXPENDITURES
INTAKE	No personal TVs.	Not available.	Severely Limited[1]	Limit to monies arriving with offender from county jail; outgoing funds limited to fees for legal services.	$5.00/payroll period for approved hygiene items.
LEVEL I	No personal TVs. Access to general TV viewing.	Not available.	Limited.[2]	Allow outside funds; expenditures restricted to canteen and restrict outgoing funds to $30 per pay period.[3]	$20.00/payroll period.
LEVEL II	May purchase personal TVs via canteen.	Not available.[5]	Limited.[2]	Allow outside funds; limit expenditures to canteen and restrict outgoing funds to $30 per pay period.[6]	$80.00/payroll period; may purchase exempt canteen items additionally.[7]
LEVEL III	May purchase personal TVs via canteen.	As allowed per IMPP 10-133.	Eligible to participate in all organizations / formalized activities.	Allow outside funds; limit expenditures to canteen and restrict outgoing funds to $30 per pay period.[8]	$140.00/payroll period; may purchase exempt canteen items additionally.[7]

(Footnotes On Following Page)

BEST AVAILABLE COPY

PROPERTY	*INCENTIVE PAY*	*VISITATION*
Intake property per IMPP 12-120.	Not available.	No visiting, except attorneys, clergy and law enforcement
Intake property per IMPP 12-120; tennis shoes, hot pot, and fan.	May earn up to current .60¢ per day incentive pay.	Attorneys, clergy, law enforcement, and immediate family only; follow KAR 44-7-104 and IMPP 10-113.[4]
Post-intake property per IMPP 12-120.	Eligible for any incentive pay level, including Industries; Level III inmates given higher priority.	Any approved visitor; follow KAR 44-7-104 and IMPP 10-113.
Post-intake property per IMPP 12-120.	As per IMPP 10-109.	Any approved visitor; follow KAR 44-7-104 and IMPP 10-113.

FOOTNOTES

[1] Self-help programs and activities shall be limited to the following for inmates on intake level: Library services, pastoral care/religious services, and gym and yard access.

[2] Self-help programs and activities shall be limited to the following for inmates on Level I and II: Alcoholic Anonymous (AA), Narcotics Anonymous (NA), library services, the Victim/Offender Reconciliation Program (VORP), pastoral care/religious services, gym and yard access, DADS/WALC, M_2W_2, and aftercare programming.

[3] The $30.00 limit on outgoing funds shall not apply to payments to the court for verified restitution and/or court costs, verified fees payable to attorneys for legal services, or verified child support payments and specialized fees/expenses as authorized by the warden or designee.

[4] Includes court/SRS appointed legal guardian.

[5] Offenders reduced from Level III to Level II may retain in-cell handicraft materials and supplies purchased while on Level III.

[6] Upon recommendation of the unit team and approval of the warden or designee, offenders assigned to private industry (minimum wage) or who receive government benefits may be authorized on an individual basis to send out funds in excess of the $30.00 per pay period limit (i.e., handcraft materials/supplies).

[7] Canteen expenditures shall be limited to $35.00 per week regardless of incentive I.

STAFF POLICIES ON CONFIDENTIALITY

I. Signature of each employee verifying that they have read the confidentiality procedure section of the manual.

II. To release information on a person under the age of 18, the parent, guardian, or authorized representative must sign the release of information form.

III. A written release of information must be obtained for any information release on a client. Request from other agencies must be accompanied by the completed valid release of information form.

IV. All case records must include a summary of the federal confidentiality guidelines (CFR 42, Part 2). Each chart must have written documentation which verifies that each client receives information about their rights of confidentiality.

_____

DEPOSITION EXHIBIT 12

S.A.T.P.
ADMISSION OF GUILT

This is to confirm that I understand the criteria for being accepted into the S.A.T.P. (Sexual Abuse Treatment Program) at Lansing Correctional Facility, which includes an admission of Guilt for my sex crime.

I realize that I am being allowed to participate in an evaluation for acceptance into S.A.T.P. with the understanding that I followed through with an Admission of Guilt.

This document will serve as my official Admission of Guilt to the following:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

_____ _____
Signature Date

_____ _____
Witness Date

_____

DEPOSITION EXHIBIT 4

SEXUAL ABUSE TREATMENT PROGRAM
ADMISSION OF RESPONSIBILITY

I understand a criteria for acceptance into the Sexual Abuse Treatment Program (SATP) at Lansing Correctional Facility includes an admission of responsibility for my sex offense.

I realize SATP is on my IPA/IPP and is a voluntary program.

This document will serve as my official Admission of Responsibility and my need for treatment.

I take responsibility for:_____

_____

_____

_____

_____

_____

_____

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_____

_____

_____

_____ _____

Signature Date

_____ _____

Witness Date

_____

SATP

DEPOSITION EXHIBIT 9
ra 10-25-96

SEXUAL ABUSE TREATMENT PROGRAM
ABBREVIATED SEXUAL HISTORY FORM

INSTRUCTIONS FOR COMPLETION OF PART I

OFFENDING BEHAVIOR

1) A "Part One" form must be completed for **EVERY** victim you list.

2) If you need additional space for each victim, add additional paper. We will supply you with paper.

3) Be sure and list every different act you did with this victim(s). Did you have intercourse, oral sex, digital penetration and/or any other combination, etc.

4) We know that you may not be able to list, with total accuracy, the specific amount of times you molested your victim(s), but what we want you to list is an **"honest estimate"** of how many times you molested your victim(s). You should think in terms of the **"maximum amount"** of times you molested each victim.

5) You should be very specific in listing exactly how you were able to get the victim to allow you to do what you wanted. If you groomed a victim, tell exactly how you groomed them. If you used force of any kind you must tell exactly what kind of force and how you did it. You must explain threats of force, etc.

6) It is very important to tell exactly how you were able to get the victim(s) to remain silent. Did you use threats, force, promises, gifts, trips, etc. This is crucial information that you should pay specific attention to and be explicit in detail.

THE IDENTIFICATION AND ACKNOWLEDGEMENT OF THIS INFORMATION IS VERY CRUCIAL TO YOUR TREATMENT PROCESS AND IN YOUR RECOVERY.

SATP

SEXUAL ABUSE TREATMENT PROGRAM
ABBREVIATED SEXUAL HISTORY

PART I
OFFENDING BEHAVIOR

Part I of your sexual history refers to the number of victims you have molested or otherwise offended against. You must think back to anyone or any situation that involved a *"lack of consent."* Remember, this section applies to those sexual activities where you were the perpetrator and a victim was involved. Each victim must be discussed separately. Answer these questions for the first victim and then start over on a new page for each additional victim. If you have any questions, refer back to the instruction sheet and/or ask for clarification. If you need more paper, let us know.

1) Name of Victim _____

   Age of Victim _____

   Your age at time of offense _____

2) How did you know this victim? _____
   (relative, neighbor, stranger, etc.)

3) What were the sexual acts you did with this victim? You should list all the things that you did or tried to do with this victim. Begin with the first incident and describe everything that happened. _____
   _____

   (If you need more space please use the back of this page or another sheet of paper)

4) How many times did you victimize this person? _____

5) Where did you do the victimizing? _____
   _____

6) How did you get the victim to do what you wanted? (Describe how you got the victim's cooperation. If you did not say anything, but you used some kind of force, bribe or trick, be sure to say what type it was.)
   _____
   _____

7) How did you get the victim to remain silent? (We need to know how you were able to keep the secret. Remember, sometimes victims don't tell because of things like your size, age and/or your position in the family.) _____
   _____

8) How did you get caught? _____
   _____

COMMENTS:

_____

DEPOSITION EXHIBIT 7

SATP

SEXUAL ABUSE TREATMENT PROGRAM
LIMITS OF CONFIDENTIALITY

The Sexual Abuse Treatment Program provides psychotherapy psychological evaluations and physiological evaluations for inmates in the Kansas Department of Corrections. The SATP staff wants you to feel comfortable in discussing your personal concerns with them, but you need to be aware of special situations in which confidentiality will be limited.

Overall safety is very important in treatment and prison. To ensure safety of everyone, the SATP staff must report situations which could be harmful to yourself or others, or a threat to the orderly operation of the facility, such as, but not limited to:

1) Mandatory reporting of child abuse.
2) Court ordered release of records.
3) Information needed to protect a third party.
4) Information needed to protect participants from harming themselves or others.
5) Escape planning.
6) inappropriate relations with staff.

The SATP staff provides reports to the Kansas Parole Board. Material from your SATP file may be reviewed by your SATP Treatment Team when preparing these reports.

When participating in the SATP, which is required by your program agreement/plan. The report to the Kansas Parole Board will include an assessment of your participation and progress during the group, psychological evaluations, physiological evaluations and recommendations for further treatment if indicated.

While the SATP staff encourages all group members to follow the instruction to keep anything said during group sessions to themselves, we can not guarantee that information discussed during group counseling will not be shared by group members with others. You need to be aware that confidentially violations can happen. Participants found to be sharing information from the group with others can be removed from the group.

I have read the information above and have been given the opportunity to ask questions about the limits of confidentiality.

Participants Signature:_____ Date:_____

Witness signature and title_____ Date:_____

DEPOSITION EXHIBIT 15

LCF-Central
LCF-East

SEXUAL ABUSE TREATMENT PROGRAM
TERMINATION PRIOR TO COMPLETION

I, _____, have freely chosen to terminate my commitment to the SATP/DCCCA, Inc. as of this date, _____.

I have been advised by _____, the LCF/SATP Facilitator, that it is in my best interest for me to participate in the Sexual Abuse Treatment Program. Although my failure to follow the advice I have received may effect my parole eligibility status, I nevertheless choose to terminate my commitment to this program. I assume the risks and consequences involved with this decision.

I CHOOSE TO TERMINATE FROM SATP/DCCCA, INC. FOR THE FOLLOWING REASONS:

_____

_____

_____

_____

I further understand that by signing this termination, my name will be removed from the waiting list. If I change my mind at a later date, the only way I will be considered for acceptance into SATP again is to submit a Form 9 to both Unit Team and SATP no earlier than 60 days from termination. My assignment to this program will then be on a space available basis only.

PARTICIPANT _____ KBOC # _____

WITNESS _____ DATE: _____

_____

IN THE UNITED STATES COURT
FOR THE DISTRICT OF KANSAS

ROBERT G. LILE, Plaintiff, vs. DAVID R. MCKUNE and CHARLES SIMMONS, Defendants.	)	Case No. 95-3266-DES

AFFIDAVIT OF ROBERT G. LILE

STATE OF KANSAS)
) SS.
COUNTY OF LEAVENWORTH)

I, Robert Lile, being first duly sworn, do hereby state as follows:

1. On January 6, 1983, I was convicted by a jury of aggravated kidnaping, rape, and aggravated sodomy in Johnson County District Court.

2. I pled innocent to these charges, and testified on my behalf, admitting that I had sexual intercourse with Diana Dahl, but maintaining that it was consensual; Diana Dahl testified that I forced her to have intercourse against her will.

3. I still steadfastly maintain that I did not rape or sodomize Diana Dahl, or have sexual intercourse with her against her will; Diana Dahl and I had consensual intercourse.

4. I appealed these convictions to the Kansas Supreme Court. On May 10, 1985, the Court affirmed the jury's verdict. *See State v. Lile*, 699 P.2d 456 (Kan. 1985).

5. I filed a state *habeas corpus* action in Johnson County District Court in 1988, Case No. 88-C-11319. This action was denied by the court.

6. I appealed the district court's denial of my state *habeas corpus* action to the Kansas Court of Appeals in 1989, Case No. 89-64134-A. The Kansas Court of Appeals affirmed the district court.

7. I appealed the court of appeals' ruling to the Kansas Supreme Court; the Court denied my prayer for review on September 20, 1990.

8. On February 14, 1991, I filed a *habeas corpus* action in federal district court challenging these convictions, Case No. 91-3057-DES (D. Kan. 1991). I voluntarily stayed this action shortly thereafter.

9. I filed a second state *habeas corpus* action in Johnson County District Court challenging these convictions, Case No. 92-C-4030. The district court denied this action.

10. I appealed the district court's denial of this *habeas* action to the Kansas Court of Appeals, Case No. 92-68708-AS. The Kansas Court of Appeals affirmed the district court's ruling.

11. I appealed the court of appeals' ruling to the Kansas Supreme Court; the Court denied my prayer for review on April 26, 1994.

12. On January 24, 1995, I filed a second *habeas corpus* action in federal district court challenging these

convictions, Case No. 95-3032-DES (D. Kan. 1995). This action is currently pending before the court.

13. I lived in maximum security at the Lansing Correctional Facility from 1983 until 1989; I currently live in the "M" Unit of the medium security prison at Lansing Correctional Facility, and I have lived there since 1989; when I filed this lawsuit in 1995, I had my own room in the "M" unit, but in 1996, I began sharing my room with another inmate.

14. In October, 1994, my Unit Team Counselor added the Sexual Offender Treatment Program to my Inmate Program Agreement ("I.P.A."); because the Sexual Offender Treatment Program required participants to sign an "Admission of Guilt" form regarding their sexual offense convictions, and because I had an appeal of my rape and sodomy convictions pending, I refused to sign my I.P.A. on October 11, 1994.

15. I filed a grievance with Warden David McKune on November 5, 1994, protesting the addition of the Sexual Offender Treatment Program to my I.P.A.

16. Warden McKune denied my grievance on November 29, 1994.

17. I appealed the denial of my grievance to Secretary of Corrections Charles Simmons.

18. Secretary of Corrections Charles Simmons denied the appeal of my grievance.

19. On March 23, 1995, Warden McKune issued an Interdepartmental Memorandum stating that inmates in

medium security who refuse to participate in recommended programs on their I.P.A. will be transferred to Cellhouse C-2 in maximum security.

20. Because of Warden McKune's Interdepartmental Memorandum stating that inmates would be transferred to maximum security if they did not participate in their recommended programs, I reluctantly signed my I.P.A. recommending my participation in the Sexual Offender Treatment Program on June 1, 1995. I agreed to the I.P.A. solely because I did not want to be transferred to maximum security.

21. Because the Sexual Offender Treatment Program required participants to sign an "Admission of Guilt" form, and because an appeal of my rape and sodomy convictions were pending, I filed a civil action, *pro se*, in federal district court on June 28, 1995 against Warden David McKune and Secretary of Corrections Charles Simmons on the grounds that forcing me to participate in the Sexual Offender Treatment Program violated my Fifth Amendment right against self-incrimination.

22. On August 9, 1995, Magistrate Ronald Newman appointed David Waxse of Shook, Hardy & Bacon as counsel to represent me in this lawsuit.

23. I felt coerced into signing the I.P.A. recommending the Sexual Offender Treatment Program because of my concern for being transferred to maximum security. In my experience, the difference between medium security and maximum security is striking:

a. In my experience, maximum security is a very hostile, intimidating environment because most of the inmates in maximum tend to have longer

sentences and are convicted of more serious crimes, and, as a consequence, care less how they act or treat others; for example, there are many inmates sentenced with "Hard 40's" in maximum, and I am unaware of any inmates in medium security with a "Hard 40" sentence;

b. In my experience, there is far more gang activity in maximum security, and very little gang activity in medium security; gang activity increases the violent and hostile atmosphere in maximum security;

c. In my experience, reported and unreported rapes and assaults of inmates are far more prevalent in maximum security than in medium security; one concern with maximum security is that there are more hidden places, such as the showers, for an inmates to rape or assault another inmate;

d. I have essentially free movement in medium security units; I have a key to the door of my room in medium security, and I can leave my room and walk throughout most of medium security anytime from 5:30 to 8:00 p.m; in maximum security, there is no freedom of movement throughout the maximum security section of the prison, and you cannot come and go as you please in maximum security; instead, in maximum security, you are only allowed out of your cell for scheduled programs, work, meals, the clinic, or if you are signed up to use the yard or library;

e. In medium security, because one generally has freedom of movement, one can use the phone at will, but in maximum security, because you are normally locked down in a cell, access to the telephone is strictly limited; in medium security, I

have a key to my room, whereas in maximum security, I would be locked down in a cell.

f. An inmate in medium security has more access to the yard than an inmate in maximum security; also, medium security has a gymnasium, and maximum security does not;

g. In my experience, because of the freer movement in medium security, it is far easier for an inmate to go to the clinic; in maximum security, in order to go to the clinic, an inmate needs a pass and must have an officer let him out of his cell;

h. In my experience, in medium security, I can generally shower whenever I want, but in maximum security, there is a strict schedule on when inmates may shower;

i. In my experience, sex offenders (pedophiles, rapists, child molesters, etc.) are seen as targets for rape and physical and mental assault in maximum security; sex offenders are perceived as deviants and freaks, and are subject to far more harassment and abuse than other offenders due to the nature of their offenses; in medium security, because the inmates want to maintain their medium security status, they are less prone to breaking prison rules or acting violently.

24. On January 1, 1996, Warden McKune instituted the Privileges and Incentives Level System for inmates at the Lansing Correctional Facility.

25. I am currently at Level III of the Privileges and Incentives Level; if I refuse to participate in the Sexual Offender Treatment Program, I will be dropped to Level I, the lowest Level of the program, and I will lose visitation

rights, property rights, canteen rights, and the opportunity for certain types of jobs that I currently enjoy.

26. If I take the Sexual Abuse Treatment program and I am required to sign the "Admission of Guilt" form and complete a Sexual Offense History, I will jeopardize the appeal of my rape and sodomy convictions and run the risk of incriminating myself regarding other sexual offenses; however, if I refuse to participate in the Sexual Abuse Treatment program, I will be transferred into maximum security, a far more hostile and restrictive environment, and I will lose a significant number of privileges I currently enjoy: it is a catch-22 situation that essentially leaves me no choice.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Robert G. Lile
ROBERT G. LILE

Subscribed and sworn before me, this 10 day of January, 1997.

/s/ [Illegible]
Notary Public

[seal]

My Commission Expires:

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE,	)	
Plaintiff,	)	
-vs-	)	Case No. 95-3266-DES
DAVID R. McKUNE, et al.,	)	
Defendants.	)	

THE DEPOSITION OF DAVID R. McKUNE, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Wednesday, November 6, 1996, at the Lansing Correctional Facility, in the City of Lansing, in the County of Leavenworth and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

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[5] justice from Wichita State University.

Q. Okay. Any other types of degrees or coursework?

A. No.

Q. No. How long have you been in prison administration?

A. Well, I started with the Department of Corrections in 1975, so –

Q. The Kansas Department of Corrections?

A. – depending on what you want to consider "administration" versus –

Q. And you've been warden at Lansing for five years now?

A. Just, yeah, right about five years.

Q. Prior to being warden, what was your position?

A. Prior to being warden here, I was the deputy secretary of corrections in Topeka, Kansas, for approximately two years.

Q. Two years. And prior to that, what was your position?

A. Prior to that, I was a deputy warden at Lansing. I think it was about two years.

Q. Okay. How long have you been familiar with the Lansing prison, then?

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[9] requests?

A. Probably the most typical would be responding to the interrogatories, discovery requests, and that. Rarely, it goes to depositions. There's only been a couple times I've even been in court.

Q. Okay. Have you ever been in court in your role as a defendant for an inmate lawsuit?

A. The last one I appeared in was in the conditions of confinement lawsuit with Judge Rogers. That one I personally appeared in court. And I guess by saying – I mean, by "appearing in court," I mean me personally bodily being there. I mean, because usually I'm represented in the trial process.

Q. I want to ask you some questions about the incentive level program and the differences with that program and security classifications.

First of all, the incentive level program, that's something that is laid out in Internal Management Policy and Procedure 11-101, is that correct?

A. Correct.

Q. I'm going to show you what's been marked as [10] Deposition Exhibit 17 and I want you to flip through that and tell me if you're familiar with that and if that's something that's currently being used.

(Witness reviews material.)

A. Yes, I'm familiar and it's being used.

Q. (By Mr. Byrd) And that's the IMPP 11-101?

A. Correct.

Q. When did that come into effect?

A. The amendment was effective January 1 of '96.

Q. Okay. Is that the first time that the incentive level program kicked in?

A. Yes.

Q. So there was – that was the first time in the prison here at Lansing that you've had an incentive program?

A. It's the first time we have had any – an official program of incentives and privileges, yes.

Q. Okay. Were you involved with designing or setting up the incentive level program?

A. Yes.

Q. What was your involvement?

A. Well, what we have is we formed – basically, [11] this was developed and implemented as a KQM process.

Q. I'm sorry. Could you explain?

A. Kansas quality management. TQM, same thing, total quality management. Kansas – that's our adaptation is KQM. But basically it's a TQM process. And we had done this, basically, and we followed that process even before we implemented KQM, but that's where we came through. We had natural work groups, and that. We had – from the line level, we started and we issued questionnaires, focus groups, things like that, in following that process.

Then as the – well, the study group, as they addressed this issue, you know, they got all the input back and we formed a study group from each of the facilities, each of the regions, and to include the parole, because it does also address parole. Then those groups met, summarized the data, the input, the recommendations, the – just the comments of all the staff, all the

people they'd gathered, on how the best way to manage [12] privileges, how to best manage incentives and what most – the staff saw as the most effective way to do that.

Then that group met, summarized it, and basically developed a product that was very – that was similar to this. At that point, then we had what we call our system management team, which is the – the management group from the central office, the secretary, the deputy secretaries, chief counsel, MIS person, those people that make up his senior staff, management staff. Then in addition to that is the parole directors and the wardens. Then we met several times to go over that, to – to see what changes we wanted to make to it, what modifications, whatever, just to critique it. And at that point, we made several recommendations, sent it back to the work group. They made some revisions, came back with the final draft, and then we as the system management team approved the final product.

Q. How many people were on the system management team?

A. Oh, there – at this time – it's changed [13] again, and several times over the last year. So I mean as a rough estimate, I'd say probably 20.

Q. Twenty? Was Charles Simmons on that team?

A. Yes. He's the head of the management team, as the secretary.

Q. Was Roger Worholtz on that team?

A. Yes.

Q. Was this – where did you get the idea for this program?

A. I don't know where the idea specifically came from. I mean, it wasn't my idea. I didn't come up with it.

Q. Was it based on another state or another prison system's program?

A. As far as I know, there was not a system like it in existence prior to ours. We've had lots of inquiries since, that they want to develop and implement a similar system, but whether they have or not, I don't know.

Q. You don't know if other states have followed –

A. I don't know. I just know there have been inquiries. You know, they want copies of how we do it and that kind of thing. It's been [14] written up in lots of national publications.

Q. So as far as you know, the incentive level system that's used throughout – the Kansas penal system is the first one to use the incentive level system?

A. With – as this model, yes.

Q. As that model?

A. I mean, lots of them have their own kind of incentive programs and that, but along this kind of a format, this model, as far as I know, it's the first one.

Q. Okay. You mentioned that you approved that final product. Did you approve that actual document that was produced, then? Your system team?

A. Well, what we did – I mean it depends, I mean, how specifically you mean did we approve this document. I mean the secretary of corrections is the one that approves an IMPP and issues an IMPP and says, "That is the policy now. Follow it." The system management team – I mean, if you get down to it, I mean I guess we approve it, but obviously it's still subject to the secretary's final cut. I mean, he's the head [15] of the department.

Q. How does the – explain to me, if you could, the difference between the incentive level and custody classification.

A. The incentives and privileges system of levels is a process wherein we're trying to lay out those privileges whereby, given certain, I mean, positives towards the goals we want worked towards to reward and reinforce that. It's – custody is a function of trust and behavior and adjustment and discipline records and that. That custody is a function of direct control, if you will, to ensure the safety of the public and us and of them and of the other inmates.

Q. Is there some overlap between the two?

A. Overlap in the sense that both systems will look at some of the same issues, yeah. Yes.

Q. And there's four different incentive levels under this program, or are there five?

A. I always forget because it also includes work release and I never – or parole and I never deal with that. There are five.

Q. There are five. First –

A. Well, six, technically, because there's [16] intake and then I through V.

Q. Okay.

A. So there's six.

Q. Level I, is that the highest or the lowest level?

A. Intake is the lowest level. Then Level I is the next lowest, with – in an institution setting, then III is going to be the highest you can get to. Then IV and V deal specifically with parole, as you progress on through the entire system.

Q. So there are more privileges associated with the higher level?

A. Correct.

Q. Okay. So Level I would be the lowest level, would be the lowest amount of privileges that an inmate would be able to have?

MR. DOWELL: I'm going to object to that. That's not what the testimony was.

Q. (By Mr. Byrd) Well, let me ask you this. I'll rephrase the question. Is it correct that notwithstanding intake level, that Level I is the lowest level of privileges in the incentive system?

A. Correct.

[17] Q. Okay. When an inmate starts out, they start out at the intake level?

A. Correct.

Q. Are they then moved into Level I?

A. After they accomplish certain aspects, yes.

Q. Okay. And when you say "Level I," that's a Roman Numeral I, as opposed to a numeral 1?

A. Correct.

Q. Right. You use Roman Numerals.

When you're in Level I, does that tell you where you're going to be housed?

A. No.

Q. Are housing classifications based on incentive level?

A. In and of themselves, no. No, the level system does not say that, "At Level I, you'll live here or there." No, it doesn't.

Q. Where do most inmates who are at Level I live?

A. I've never really tracked that. We have some at the various facilities.

Q. Okay. Let's – unless I specify otherwise, I'm going to be asking you questions about Lansing, to make it easier for you –

A. Okay.

[18] Q. – and how the incentive level and the custody classifications are, how they pertain to Lansing.

A. Okay. Good.

Q. And I don't know if that affects your answer, but are most Level I inmates, are they in a certain housing – custody classification here at Lansing? For example –

A. I – go ahead.

Q. For example, are most Level I inmate – are there more Level I inmates in the maximum housing units than there are in medium or minimum?

A. Well, again, I mean I've never just printed out the numbers to say, "Where are each of them located?" I think it's probably a good assumption that more Level I's live in the maximum compound than live in the medium compound than live in the minimum compound.

Q. Do you use, as part of the incentive level program – I don't know if you refer to it as "housing classifications" – as part of one of the incentives that an inmate can earn? A privilege? Is a housing area or an area of the prison one of the privileges that an [19] inmate can earn, as they progress up the incentive level?

A. No.

Q. No, it's not. Okay. The earnable privileges are set out in IMPP 11-101, is that correct?

A. Correct.

Q. And those are located there at Number 1?

A. Right.

Q. Okay. Okay. So the only privileges that are involved in the incentive level system are television ownership, handicrafts, participation in organizations and formalized activities, use of outside funds, canteen

expenditures, property, incentive pay, and visitation? Those are the privileges that are laid out as what can be earned by an inmate in the system, is that correct?

A. Per the privileges and incentives program, yes.

Q. Attached to Exhibit – Deposition Exhibit 17 is what I'm going to refer to as Attachment A, and it's titled "Offender Privileges And Incentives Level System," and tell me if this is correct: This lays out the various privileges that an inmate in the program can [20] earn, is that correct?

A. Yes.

Q. For example, a person who is at the lowest level, Level I, he's not entitled to a television, is that correct?

A. I mean the lowest level is intake.

Q. Okay.

A. I mean –

Q. Okay. Intake – as opposed to someone who has not just been brought into the prison in the intake system, if a person is at Level I, that's the lowest level outside of those who are in the intake program?

A. No, no, we do have them here on intake level also. They're not new to the system. If they do not satisfactorily complete all the requirements to proceed up from intake, then they remain on intake.

Q. Okay. Do you have –

A. Just not – it's not just a function of "You're here. Now you're done with intake."

Q. Okay. And so that's the very lowest level, is that correct?

A. Correct.

[21] Q. Okay. Do you know about – do you have a rough idea of – about the percentages of inmates who are in the various levels?

A. No, I don't.

Q. Is there a majority who are in one level over some other level?

A. I would make the assumption that they're in Level – probably the biggest number is in Level III, because on implementation of this system, we grandfathered every single person in the system at the time to Level III. It's my assumption we've still got a majority on III.

Q. Okay. So when you started the system, everyone started out on Level III, is that correct?

A. Correct.

Q. And then –

A. The day we implemented the system, everybody started on level I. The people that walked in the door that day, the next day, are on intake level. But anybody in the system was grandfathered to Level III.

Q. Okay. Do you know when the system – that was – was that January 1st, 1996?

[22] A. Right.

Q. That would be the first day? So on January 1st, 1996, everyone started at Level III?

A. Right.

Q. Okay. Are you familiar with Robert Lile, the –

A. Yes, generally.

Q. Generally? Do you know what level he's currently on? What level of the system he's on?

A. No, I don't.

Q. Okay. At some point, some of the inmates are moved off of Level III and are moved to different levels?

A. Correct.

Q. Lower levels, correct?

A. Correct.

Q. What would be some of the reasons they'd be moved to lower levels?

A. Well, again, in the IMPP, there's a list of different reasons on progression and demotion, if you will. I don't remember what they exactly phrase it. But it applies to whether or not they're working, whether or not they're in their programs, whether or not [23] they've gotten disciplinary reports, whether or not they've gotten fired from their work for reasons of their own cause. Those are probably some of the main reasons. The general adjustment issues are what causes –

Q. Okay. To make sure I have this straight, let me go through this. You can be moved to a lower level in the incentives program because of a disciplinary problem?

A. Yes.

Q. You can be moved to a lower level in the incentives program because you refuse to work in a work program?

A. Yes.

Q. You can be moved to a lower level in the system because you refuse to take a recommended program agreement?

A. Yes.

Q. And you can be moved to a lower level because you attempt to escape?

A. Depending on how you processed it and all, then yeah. I mean, most likely you could.

Q. Okay.

A. Because there's another list in there that – charges that would – that also include other

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[27] A. It's – yes, it's the least privileged level.

Q. Least privileged. And then Level I is the second least privileged?

A. Correct.

Q. And then Level III is the highest, or is Level IV the highest privileged level?

A. Level III would be the highest privileged level within an institution.

Q. Within an institution. Are there any Level IV inmates here at Lansing?

A. Not that I'm aware of.

Q. So the highest level here in the prison is Level III?

A. Would be a III.

Q. Okay. We were talking about the level system and housing arrangements. How are housing classifications determined? Is it based on the dangerous nature of the individual?

A. Well, housing is going to be several different issues. I mean, it's going to be involved in what their custody is. Sometimes – I mean it will depend on what their medical condition can be. Because, I mean, proximity to a clinic. It can be [28] just – I mean we have – we have some medium housing in the maximum unit. We have some minimum housing in the medium unit. And so, I mean, it's not strictly a custody definition of which facility or which unit you're going to live in. And within the – within the custody unit, like the max unit itself, the primary determiner would probably be by custody, whether you can life in medium custody housing or in maximum custody housing. Some of that will also depend on your current status at the time, restrictions. Inmates live in one place, workers live in another place. Some of our UACs – we're transitioning right now, trying to decide whether we want all the UACs to live in one place or if we want to keep them divided up among the population or not. So we're trying to decide that. So there are several factors that determines where you will live.

Q. What is – when I – explain to me what the medium facility is here at Lansing.

A. Okay. We have – the old original KSP is the maximum facility here, and that is behind the [29] walled, stone-walled perimeter. That's generally referred to as our max unit, although – because the majority of the cells in there are maximum security, although there are some medium housing cells in there as well. Then also then, the medium unit was –

Q. There – excuse me.

A. Uh-huh.

Q. You said there are some medium cells –

A. That are in the max facility.

Q. – in the max? Okay.

A. Right. And so I mean that's why we generally refer to it as the max unit, because the majority of the cells are max cells.

Then adjacent to it, contiguous, is the medium unit. The one housing unit, Q, is an older dormitory building, so it's been around a while. But generally speaking, the medium facility was opened in 1985. The majority of the cells in there are going to be medium security cells or medium security dormitory, as in Q. We are – we do have some of the cells in Q – or in K, L and M designated as minimum custody also. So, I mean, you can have some medium in the max, [30] you can have some minimum in the medium. But generally, because of the majority, we just refer to it as the max unit, the medium unit, the minimum unit. The minimum unit is all minimum.

Q. You are talking about the maximum security facility being behind the stone walls.

A. Uh-huh.

Q. Are you familiar with the phrase "being rolled behind the walls"?

A. Yeah, I – that's a –

Q. What does that mean?

A. – phrase that they use. Being rolled is when you're going to get moved. You can get rolled from the hill, would be another phrase you'll hear here. And because our east unit is our minimum custody unit, which used to be the women's prison for the state, and it sits over on the hill, over on Highway 5 – and so generally, when you hear about getting rolled, you're getting moved back to one of the other units, so you get rolled from the hill, generally. You'd be going to the medium or the max. Generally, if you're being rolled from the medium, you're going to [31] go back to the max unit.

Q. So to be rolled behind the walls would be to move –

A. To move to the max unit.

Q. – to the max unit?

A. Right.

Q. Okay. I want to ask you some more questions about this IMPP 11-101. The eight privileges that are listed, the earnable privileges, one of them is "Participation in organizations and formalized activities." Could you explain what that involves?

A. Right. There's – on the chart for the details, it will list exactly which ones those are, but basically we're talking about participation in different organizations like Jaycees,

Seven Steps, Upper Room, some of the cultural groups, AAO, Chicano. Those are examples.

Q. So as you progress – if you go from a higher level security – or excuse me, incentive to a lower Level I, you would lose the opportunity to participate in those activities?

A. Correct.

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[57] facility?

A. Well, not necessarily.

MR. DOWELL: I'm going to object to the form of the question. I think that the way that the question is worded, you're asking, first of all, they are putting people in a spot because the people want something else.

MR. BYRD: Let me rephrase the question.

Q. (By Mr. Byrd) My understanding is that there are medium custody inmates who are housed in the medium – or excuse me, the maximum security facility. Is that correct?

A. Right.

Q. Okay. What are some of the reasons why they are housed in the maximum security facility?

A. Okay. Some of them are because when they got their – they were at max custody and they got their medium custody and we have medium custody beds in there and some of them – I mean the whole – there's a whole variety of reasons of why they're still in there. Some of them is because they want to stay in there. And we have a lot of inmates that [58] want to stay in the max unit. We have some inmates that want to go on the

medium unit, and it remains pretty full, and so for those cases, they're waiting to get to the medium. We have some inmates that live in the max unit in medium beds because of the various programs they're in, because of the jobs they're assigned to and that's where they live. And so there's three or four reasons to live there.

Q. You mentioned they may –

A. Access to the clinic is another big one.

Q. Sure. One of the reasons they may live in the max unit is because of a program they're involved in. Could you explain what type of programs you're talking about?

A. Oh, they could be assigned – we – it's like we're going to open the whole therapeutic community for substance abuse. Those will all be medium, max, and minimum beds in there. They could be in that. And we're making arrangements to move them in. We've got certain inmates in, oh, – some of the inmates in special ed live in the max unit, just stay in there. Sometimes some of the [59] ones that live in the medium we allow to go back and forth. We try to keep that minimized, the number of inmates that live in one unit and go into the other unit. And so they might be – they could be in any one of the programs. We have SATP. They could be in ADAPT. They could be in special ed. They could be in regular ed.

Q. If you're in the SATP, you're not required to live in the maximum unit, are you?

A. No.

Q. Okay. Now, this – back to Deposition Exhibit 20, I guess what's confusing is that are people who live in the

maximum security facility, are they the ones who are the maximum people for purposes of their visitation restrictions?

A. No. No, they are maximum custody inmates. And that's why we have the footnote here that medium inmates living in the single cells in the max unit visit in the same area and times – oh, I'm sorry, I misread it. They do visit. I'm sorry. I was wrong. I thought they visited the same as the mediums.

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[61] A. Those are all medium – well, I shouldn't say they're all. It would be either medium or minimum. We do not put maximum custody inmates in multiple-occupancy cells.

Q. So if you're a maximum custody inmate, you have your own cell?

A. Yes.

Q. Okay. So according to this schedule you laid out on your February 12th memo, a person, simply because they're living in the maximum facility, is – but they're a medium custody inmate, they may still have medium visitation visiting rights, is that correct?

A. Correct.

Q. Okay. And C-2 is in the maximum facility but the inmates in that are medium custody, is that correct?

A. Correct.

Q. Okay.

A. Correct.

Q. Where are Q, K, L, and M?

A. Those are the ones that are in the new – the newer medium unit that was opened in 1985. Q dormitory is the open dormitory that is indeed one of the older buildings that's been

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[64] participate in a program will not get you points to change your custody.

Q. Then what was – what are you thinking about when you said that you thought it could affect?

A. When you get to some of the exceptions and as the incentive program overlaps to it, then sometimes, yeah, you can lose your custody because of the other issues.

Q. One of those issues being –

A. Usually through the exception process.

Q. Okay. Let me try and design a hypothetical to sort of flesh this out, because I'm still very uncertain about this.

If you're a medium custody level inmate and you started out at Level III, where everyone started out, and you refused to enter into your program agreement, what happens to you?

A. Medium custody inmate living in the medium unit –

Q. Right.

A. – Level III? In the level system, then refusing to enroll in the program, you will lose a level, and – and per

our policy, then [65] we will move you into the maximum unit, to one of the medium beds over there, if that's where you stay, in medium custody. It's possible you could also lose your custody.

Q. You could also be moved up to maximum custody?

A. Yes.

Q. How – at what point is that determined? You mentioned it was possible. How is that possible?

A. That would depend on probably the rest of the behaviors and what all else was going on in the situation. If it's a volatile kind of refusal, I guess. And so you get into the other – to belligerence, misbehaving, those kind of things.

Q. For example, if an inmate is a medium custody inmate in a medium facility at Level III and refuses to enter into the program agreement, it's possible that – well, he will be moved into the maximum facility but into a medium bed?

A. That's possible. Right now we're going through a process to study and determine whether or not we are going to have it

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[70] Q. You state in here that one of the reasons it's preferred is the nice gymnasium, the open yard area and the individual rooms within the pods of K-L-M units.

A. Uh-huh.

Q. You mentioned earlier that they're going to be double-bunked rooms, they'll no longer be individual rooms.

A. Right.

Q. Okay. But –

A. The open yard, what I'm referring to there is I mean they have a yard in both the max unit and in the medium unit. There's a yard in each, per se, but in the max unit, it's more of a schedule on what's – what cell houses can get out to go and when they can get there. They can go at different times during different days. The open yard schedule I was referring to in that memo is that just anytime the yard is open, the inmates in the medium can go. So it's – it's more open, more accessible.

Q. Okay. So for example, an inmate who is in the medium unit has more access to the open yard and the outside than an inmate in the [71] maximum facility, is that correct?

A. Correct.

Q. And that doesn't depend on the inmate's medium custody status in either of those two units?

A. Correct.

Q. Okay. So a person with medium custody status who is housed in the maximum facility, his access to the yard and to the outside is far more restricted than the person who's in the medium facility, is that correct?

A. Yeah, it's more restricted. I mean "far"?

Q. Okay. It's more restricted?

A. Yes.

Q. According to your memorandum of March 23rd, 1995, "Inmates refusing to participate in programs and who maintain their medium custody shall be housed in C-2." We've talked about C-2. Is that C-2 that's in the maximum facility?

A. Correct.

Q. But it's – those are medium beds?

A. Correct. That's those multiple-man, four-man cells.

Q. Okay. So if an inmate who, at the time this [72] memo was put out, was in the medium facility and had his own individual cell, if he refused his inmate program agreement or the programs recommended, he would be moved to a multi-occupancy cell in maximum facility?

A. Correct.

Q. Okay. Is this a program that's still in effect?

A. Yes.

Q. Okay. Next I'm going to show you Deposition Exhibit 18 and Exhibit – Deposition Exhibit 19. I'm going to see if you're familiar with those.

(Witness reviews material.)

A. I know what they are, but I couldn't swear I've seen them before. But I mean I know what they are. I know what they're doing, yes.

Q. (By Mr. Byrd) Are they, as far as you know, something that are in effect now?

A. Yes.

Q. Now, could you tell me what Deposition Exhibit 18 is?

A. It's a memo from Danielle Wagner, who is an Activity Specialist I. It's just to all

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[84] prison, the prison system in Kansas?

A. I mean in a general sense. I mean –

Q. In a general sense? Are you familiar with – I'll cite to you Kansas Regulation 44-5-105(c)(1) that says that an inmate shall not be punished for refusing to enter into a program.

A. Uh-huh, yes.

Q. Okay. Could you explain to me, is it a punishment for an inmate to be moved from the medium facility to the maximum facility and the incentive level systems? Are those punishments?

A. No, we do not view them as punishments.

Q. You don't view them as punishments? Why not?

A. No, we don't. What we have is those are certain privileges that are available for them to earn, and they earn them through their positive interaction, their positive participation, their positive behavior, their positive accomplishments in this institution. And the – the difference is that – between punishing someone for some act they commit versus a choice, a decision [85] they make not to do something which then does not earn them additional privileges or the right to keep privileges that

we have granted in the past. Because privileges are something that we can take and give, based on their actual behavior, their actual actions at the time. Punishment is something you do to someone for something they do, not the positive – not the decisions they make for which there are consequences.

Q. Okay. So you're distinguishing a punishment on the basis of whether the person does an act? Is that correct?

A. I think in a nutshell, that's – that's close, yeah.

Q. Couldn't a person be punished here in your prison for failing to act in a certain way? I'll give you an example.

A. Yeah, I –

Q. If a prisoner was told to leave a specific area and he just didn't, he could be punished for that?

A. True, true. Disobeying an order. So in that sense, it's not doing something and it's a – it's a negative sanction that we apply to [86] them and it's something that we're doing and I – you know, I don't know. I mean is it – trying to distinguish between the two, I mean, can be difficult, but I mean it's the difference between something that we do to them as a result of this action or inaction as opposed to there are consequences to choices in life, and whether or not you earn a privilege or whether or not you retain a privilege and the difference between some other punishment that's meted out.

Q. Why isn't – so you're saying that if a person refuses to enter into a program, that your removal of them from the medium facility to the maximum facility is

a consequence of their action to refuse to enter the program and it's not a punishment?

A. Correct.

Q. Why isn't that just simply a semantic choice of how you want to apply a label to a certain action?

A. Well, I – because there is – I mean there is – before we take punitive actions on individuals, before we take punitive actions on inmates, there are processes to do that, [87] and – and punishment is those things over and above – it's putting people in disciplinary segregation, it's doing the other kind of things that actually mete out discipline.

Q. Is this – is this just –

A. This is a –

Q. – a variation in degrees? I mean of punishment being – are you only limiting punishment, as you understand punishment, to a disciplinary process?

A. I'm not sure. But always exactly tied to the disciplinary system and its official capacity? I don't know. I'm just saying that this isn't punishment. I mean I don't see this as punishment. These are actions that – decisions they make, and there are certain – although they may be negative consequences, there's a difference between negative consequences and being punished.

Q. Okay.

A. Sometimes you lose the privileges you had or you don't earn additional privileges because of choices you make, and that's one of the things we emphasize. I

mean that's a large [88] part of the incentives and privileges program. It's a large part of our whole accountability and responsibility management training. It's a large part of everything we do is teaching accountability and responsibility and that there are consequences for choices.

Q. You state in response to Interrogatory Number 6, from Deposition Exhibit 23, that, "Disciplinary action through the use of the disciplinary process is not taken for refusal to participate in SATP programs." Why isn't it a fair characterization for an inmate to say that he's being disciplined for refusing to enter into an SATP program, when you move him from medium facility to maximum facility and all the attendant loss of privileges? Why is that not a fair characterization?

MR. DOWELL: I'm going to object to the form of the question. You're saying moving from medium to maximum –

MR. BYRD: Well, I'll rephrase the question.

MR. DOWELL: With all of the attendant loss of privileges, and you're [89] getting apples, oranges and bananas all screwed up in the question.

Q. (By Mr. Byrd) Okay. Well, let me try and – I'll try and explain it. It will be a long question.

When a person who's in medium facility refuses to enter into an SATP program, as I understand what we've talked about today, that person, because of their refusal – and correct me if I misstate anything – will be moved into the maximum facility from a two-person cell that has a

door and a key that he can go to into C-2, which is a four-person cell. Is that correct?

A. C-2 is a four-person cell, yes.

Q. But so far I'm correct in stating that if he refuses, that's what happens to him, correct?

A. Not necessarily. I mean because – I mean you're saying he's going from this two-person room with a door, on and on, and he could also be in Q dorm which is just a wide-open dormitory, multiple-man, wide-open bunking –

Q. Well, let's use Robert's situation, Robert [90] Lile, who is – who you note in your interrogatory responses is in M unit, which is – that's a unit that has a door and a key and it's in one of the pods with the common areas.

A. Right.

Q. If Robert refuses, he's moved into the maximum facility into C-2, according to your March 23rd, 1995 memo, correct?

A. Correct.

Q. Okay. And as part of that move, his access to the yard is restricted, isn't that correct?

A. Yes.

Q. He will have his incentive level – he will go from whatever incentive level he's at now, which I believe is Incentive Level III, he will go up to Incentive Level II and he will have his canteen expenditures limited, he will have his incentive pay possibly limited, he will have his organizations and formalized activities limited, he will

have handicrafts will not be available, and he will have a limitation on his outside funds. Is that correct as well, if he refuses to enter into [91] the SATP?

A. All with the exception of the limitation on outside funds. I don't think that one is.

Q. Oh, okay. All but that one?

A. Right.

Q. Why are – why isn't it fair for Robert to consider that a punishment or a penalty because he loses those things because he simply refused to enter into the SATP?

A. Because of the system of accountability and responsibility that we follow. Then what the difference is, again – I mean, I don't know how to describe it much better, but the difference between punishment and the privilege process is whereby when you make a choice, you're knowingly making a choice and a decision that those are the things you won't get anymore. I mean I don't know how else to say it.

Q. Okay.

A. I mean there's a difference between punishment and not earning privileges.

Q. Okay. Who determines – under that Kansas regulation I cited to you, who determines whether that regulation has been violated? [92] Do you know? Is there an administrative hearing or is that – are you the one who would make a decision on that?

A. Well, it would depend on where the issue is. When it comes to the incentives and privileges system in

its entirety, then I assume the secretary and the chief counsel have been over it and have determined it's in compliance with KARs. I have the responsibility at this institution for a living unit rule or for general orders or for policies that I issue that I make that determination. I mean, who ultimately makes those determinations is open.

Q. Did discussion of that KAR 44 dash whatever that I cited, did that come up in your team discussion when you were planning this incentive level system?

A. As best I recall, it did. I mean I couldn't say by the number that's what we talked about. I mean we talked about all the issues. We talked about privileges and the loss and we talked about programs and voluntary and all those issues. And we talked about – I mean, I don't know how many [93] KARs, how many IMPPs and general orders. We changed a lot of them through that whole official process.

Q. Okay.

(Off-the-record discussion.)

Q. (By Mr. Byrd) Okay. You mentioned earlier in the deposition that the administration was considering whether inmates who refused to enter into a program would lose their custody status. Do you recall that?

A. Correct.

Q. What are the – what's being considered there? That they want to have a rule that says, "If you refuse to enter into a program, your custody status will change"?

A. I'm not real sure of all the parameters of the group. The group is just being formed, just being appointed, and I'm not – I'm going to be one of the people on that group, but we don't have our charge yet and I just know, I mean, that's one of the issues that that group is going to be looking at is, do you leave people in minimum custody.

Q. Do people in the C-2 cell house that you mentioned in your March 23rd, 1995 memo, do [94] those people, can they work, can they have jobs?

A. In C-2?

Q. Yeah.

A. Yes, they can.

Q. Okay. I want to ask you some questions – is the maximum facility, as a whole, considered more of a dangerous or threatening area than the medium facility?

I mean, I don't know. I mean, that would be hard to say. I mean, I have – I mean, I can't tell you the number of assaults in either one or the other, just off the top of my head. I mean, I can tell you we have them in both and, I mean, is either one more dangerous than the other one? I mean, I really couldn't say.

Q. So you don't have an opinion?

A. I – I just – I'm not sure there's enough differences between the two to say one is more dangerous than the other. I mean, they both have long-term, they both have violent offenders, they both have all kinds of nooks and crannies and hiding spots, and I have assaults in both of them.

[95] Q. Let me ask you this: Maximum custody inmates generally are the more dangerous convicted felons?

A. Well, I –

Q. There are more first-degree murderers who are maximum custody inmates, is that correct?

A. No, I don't think you can say that either. I don't think that would be accurate. I'm not sure. I mean, I've not counted them, again. Because custody isn't just a function of your crime, it's also a function of all of the other points and some of that just is a matter of how you're adjusting, what you're doing, how much time you've got served, all those things. I mean, I have murder 1's living out in the minimum unit.

Q. If a person has what is referred to as a Hard 40 –

A. Uh-huh.

Q. – are they generally going to be a maximum custody inmate?

A. Well, there again, I mean it depends on when they got it and how far into the system they are and what their behavior has been. I mean –

[96] Q. I'm asking you in general.

A. I can't – well, in general, you can't do that. I mean, it's not determined by are they a Hard 40 or not. It's not determined by are they a lifer, are they a murderer, are they a rapist, are they a check writer. there's just too many other factors coming into play that I can't tell you that generally the dangerous ones are in the max

unit. I mean, if we have a minimum custody inmate run off from a minimum custody downtown work crew, we put out the flyers and we tell them they should be considered dangerous. So – and that's whether they're check writers or robbers or murderers.

Q. People – you've mentioned people were assaulted in both medium and maximum custody. Were you here when – are you familiar with the guards who were killed in 1994 in the rec shed?

A. The one officer was killed there, yes.

Q. Or one officer.

A. 1993.

Q. Was that in the medium or maximum facility?

A. That was in the max unit.

* * *

[100] Q. Okay. You don't know if or when someone was killed in the medium facility since you've been here?

A. I'm not aware of anybody being killed in there, no.

Q. Okay. Would you disagree with an inmate if they said, "I don't want to be in the maximum facility because I think it's more dangerous and I fear for my life there"?

A. No, I don't think they have a valid claim.

Q. And why is that?

A. Because I don't think it is.

Q. You don't think it's more dangerous?

A. I think you're – I think you can be in just as much danger in the medium as you can be in the maximum.

Q. You don't think that the type of inmates who are housed in the maximum facility have committed more serious crimes than those who are in the medium facility, on the whole?

A. I – I mean, if you actually went and surveyed who's in there today, I'm not sure what it would show, but, I mean, I just know that I have the full spectrum of crimes, the full spectrum of sentences on – even clear [101] on down to my minimum honor camp, if you will, at Osawatomie. And so to say that the inmates in the max have more serious, more dangerous crimes, then I can say no, I don't believe that.

Q. So you would disagree – Roger Worholtz, if Roger Worholtz said that the more dangerous felons were in maximum security, your testimony is you disagree with him?

A. Well, the difference is, if you're saying – I mean, is it more dangerous to live in the maximum unit or to live in the medium unit, then I don't know as there's a big enough difference that you can do that. You have inmates in the maximum unit that have – I mean, there's other reasons, as well, to be in the max unit. Some of them are because of control issues. Some of them are because if I take that same murder 1 life sentence and I can – if I walk through and show that it's just a – a high public profile kind of crime and it may have been some – oh, I don't know, some – some spur-of-the-moment thing, you know, the guy's not – he may go through the whole

reception process and not be a [102] dangerous type, other than this spur-of-the-moment crime, but nonetheless, we think we could probably trust him in a lesser setting. But if you put him out there and he does something wrong, we can't take that kind of heat from the public because how in the world can you put a brand new life sentence murder 1 in the public where he has access to do something like that, to run off. So sometimes it's the public perception, sometimes it's general protection kind of issues that you – you may or may not be more dangerous just because of the crime. And so –

Q. Let me give you an example of an inmate and you tell me where, in general, without knowing anything more, he would most likely be. A person who's committed first-degree murder who has gotten in several reported fights in the prison, who is known among the guards as having a belligerent and volatile attitude and being very angry, has committed several prison violations. More likely than not, he'd be in the maximum facility, wouldn't he?

* * *

[120] were convicted, the sexual offense? Is that what you're understanding is?

MR. DOWELL: Object. That's not what the form talks about, and the witness has indicated that he hasn't seen the form, so you're asking him to speculate.

Q. (By Mr. Byrd) Is that true? You've never ever seen the –

A. I don't recall seeing that form.

Q. You don't recall it?

A. I mean –

Q. Is it possible that you've seen it at some time?

A. It's possible.

Q. Okay.

A. I just don't remember having seen it. I mean, I would not want to say absolutely I've never seen it and you walk in and say, "Aha. Ten years ago, you initialed this sheet." So I don't recall ever seeing one.

Q. The acceptance of responsibility form, an inmate may not want to sign that because their case is on appeal. You'd agree with that, wouldn't you?

A. Yes.

[121] Q. Okay. And you've talked about a person – an inmate's decision to enter into the SATP program and other programs as their choice, is that correct?

A. Yes.

Q. You refer to it as a choice?

A. Yes.

Q. All right. And that they must deal with the consequences if they refuse not to choose to enter into the program.

A. Correct.

Q. And that's how you see the incentive level system, correct?

A. Correct.

Q. You'd admit, then, that there's a price that they have to pay for making that choice, wouldn't you?

A. There are consequences of that choice, yes.

Q. Okay. So it's not a completely free and unfettered choice, is it?

A. Are there any?

Q. But –

A. I mean, there's consequences to every choice you make in life, and there are consequences to that choice as well.

DEPOSITION EXHIBIT 21

[LOGO]

KANSAS DEPARTMENT OF CORRECTIONS
INTERDEPARTMENTAL MEMORANDUM

DATE: March 23, 1995
TO: All Concerned
FROM: David R. McKune, Warden
SUBJECT: HOUSING OF MEDIUM CUSTODY INMATES

The Medium Facility has long been recognized as a preferred housing location for inmates with medium custody due in part to the nice gymnasium, open yard area and the individual rooms within the pods of K-L-M Units. It seems quite reasonable to expect that inmates who are responsible enough to live there to be responsible enough to participate in their program agreements and/or program plans. Based on this belief the following new policy is to be implemented:

Effective May 1, 1995, inmates that refuse to participate in recommended programs on their IPA or IPP will not be allowed to move to the Medium Facility. Those already housed in the Medium Facility shall be offered the opportunity to participate in previously refused prograsm [sic] at their next regularly scheduled 120-Day Review. Inmates refusing to participate in programs and who maintain their medium custody shall be housed in C-2.

DRM/MN

cc: Deputy Warden-Programs
Deputy Warden-Operations
Deputy Warden-Support Svc
Major
All Inmate Bulletin Boards
All Unit Team Managers
File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE, Plaintiff, -vs- DAVID R. McKUNE, et al., Defendants.) Case No. 95-3266-DES

THE DEPOSITION OF CHARLES SIMMONS, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Wednesday, November 13, 1996, at the Kansas Department of Corrections, 900 SW Jackson, Suite 400-N, in the City of Topeka, in the County of Shawnee and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

* * *

[4] transcript and point out the inconsistencies?

A. I understand.

Q. I'd ask if you don't understand a question, will you let me know?

A. I will.

Q. And then if you answer a question, I'm going to assume you understood the question. Is that fair?

A. That's fair.

Q. Where are you employed?

A. State of Kansas, Department of Corrections.

Q. What is your title?

A. I'm Secretary of Corrections.

Q. What is your educational background?

A. I'm a graduate of Kansas State University in 1973 with a BS in political science, and a 1976 graduate of Washburn University School of Law, and I was admitted to the bar in September of 1976.

Q. Are you still an active member of the bar?

A. Yes, I am.

Q When did you go to work for the Department of Corrections?

A. I began work for the Department of [5] Corrections as legal counsel for the, what was then called, Kansas State Penitentiary in February of 1979.

Q. Did you job title change, over time?

A. Yes, it did.

Q. Just give me the highlights.

A. In February of 1981, I moved to the central office here in Topeka as a staff attorney. Became Chief Counsel for the Department in 1983. Served in that capacity until being named as Acting Secretary of Corrections in August of 1994, and then later as Secretary of Corrections in April of 1995.

Q. So you've been head of the Department of Corrections since '94?

A. Since August 19, 1994.

Q. I think I just made an assumption. Are you the Secretary of the Department of Corrections?

A. Yes, I am.

Q. Is there anybody within the Department of Corrections who is your boss?

A. No.

Q. Are you – is that an appointed position?

[6] A. Right. That's an appointed position as a member of the Governor's Cabinet. The appointment is made by the Governor.

Q. What are your duties as Secretary of Corrections?

A. General management and supervision responsibility for all of the activities of the Department of Corrections, including facility operations, parole supervision, oversight of community corrections programs.

Q. As Secretary of the Department of Corrections, what is your role with respect to the Lansing Correctional Facility?

A. That's one of the correctional facilities that is under the supervision, the overall responsibility of the Secretary of Corrections.

Q. Does the warden of Lansing report to you?

A. He reports directly to the Deputy Secretary of Facility Management, and that individual reports to me.

Q. And do you have overall responsibility for – ultimate responsibility for all of the programs run in the corrections system?

A. Yes.

* * *

[17] Facility to all concerned regarding the housing of medium custody inmates.

Q. (By Mr. Rebein) Have you seen that before today?

A. Yes, I have.

Q. Did you receive a copy of that when it was issued?

A. I'm not listed as having received a carbon copy, but I do recall having seen this. Exactly when, I – whether it was contemporaneous with its issuance or not, I can't say right now.

Q. Who drafted that memorandum?

A. Well, the initials here are – it's a memorandum from David R. McKune, and the initials behind that are "MN." My guess is that that is Mike Neve, who is the classification administrator at Lansing Correctional Facility, but I don't know that for a fact.

Q. Is it your understanding that what this memo is saying is that if a person does not agree to enter into the SATP program, that they could be moved from medium security to maximum security?

[18] A. Their housing assignment would be changed. If they are in medium security and did not agree to participate in sex offender, they could be relocated. If they were in another housing setting and did not agree to participate, then they would not be moved to this medium security facility.

Q. Were you involved in any discussions with Mr. McKune before he issued this memorandum about this subject?

A. My recollection is that I was, yes.

Q. And I take it from the fact that it was sent out, that you approved of that.

A. This memorandum is not inconsistent with the discussion that I had with Mr. McKune.

Q. What's the purpose of tying the inmate's housing arrangements to their participation in the SATP?

A. That's a location where the – what we try to do in the system is place people in housing areas that are suitable for their program participation as well as their custody level, and also whether they participate in work. If an individual does not want to participate in programs or participate in work or other [19] assignments that they have been given, then they don't – don't earn the right or the opportunity to earn certain privileges or certain locations to live.

Q. So is the purpose to give an inmate an incentive to enter into the SATP or other program by making the living arrangements of that inmate contingent upon that participation?

A. That's a part of it, yes.

Q. And who came up with this idea?

A. That's – I don't know a specific person that came up with that idea. That's been the department's overall philosophy of offenders being accountable and responsible for their conduct and earning the privileges that they receive. That's been the department's policy or policy direction for a number of years.

Q. What's you understanding of "punishment"?

A. That's a pretty broad question. In what context?

Q. In the corrections context.

A. We have a disciplinary procedure, disciplinary process that we use to impose punishment, and that occurs – we have [20] certain rules that are in place that are issued to inmates. We expect compliance with those. Where there's an apparent violation, there's a disciplinary report written, there's a hearing process and a determination, and if guilt is determined or there's an admission of guilt, then there are sanctions that are imposed as part of that. And it's all through a due process proceeding, and that's the way we impose punishment.

Q. So punishment would be – would you agree that it's an adverse consequence of failing to do a certain action?

A. That cons – if that action that they fail to do constitutes a violation of the rules that have been published, then there certainly would be an adverse consequence to that.

Q. Are inmates who don't obey the rules at the Lansing Correctional Facility punished?

A. Yes.

Q. And how – in what ways are they punished?

A. Well, they're – depends on the classification of the disciplinary rule that they violate. There are three [21] classifications. Level I is the – or Severity Level I is the most severe violations and Level III the least severe, and there are sanctions that go with each of those.

For example, there might be a disciplinary segregation imposed. There might be a forfeiture of earned good time credits. There might be a fine imposed. There might be a loss of privileges, specific privileges, for a period of time. There might be extra work imposed. And all of these are for varying lengths, depending, again, on the severity of the disciplinary rule violation.

Q. Tell me about segregation as a form of punishment.

A. An individual, if they were found guilty of, say, for example, a Level I disciplinary violation, they could be assessed a period of disciplinary segregation. I think the rule provides for 45 days for a single offense, is the maximum.

What that means is they would be placed in a separate housing area, they would [22] be confined to their

cell essentially 23 hours a day, they would lose all of the privileges that they have. It's a punishment, it's an austere environment, and, you know, you live in your cell, you eat in your cell, you're released for showers, and you're released for a period of exercise.

Q. So you would agree, then, that a change in a person's housing inside the institution is used as a form of punishment?

A. Through the disciplinary process, it is, yes.

Q. You also mentioned a loss of privileges. What type of privileges are taken away as punishment?

A. Could be a – well, there are – we have what we call an earned privileges program now that we implemented last January, January 1st of 1996, where inmates earn privileges and there's an orientation level and then three levels after that. And you can earn privileges over a period of time in each of those. If you fail to participate in work or programs or incur disciplinary violations, have a bad attitude, those sorts of things, [23] you can go back one level or two levels and that's all outlined in the earned privileges system.

So there's two different ways, in answer to your question, that that could occur. One is through the earned privilege system and losing privileges by going back a level or two levels, depending on where you were, for the things I indicated. A second way to lose privileges is as a sanction through the disciplinary process, where for a period of 30 to 60 days for a violation you might lose your electronic equipment, you might lose an opportunity to go to the canteen for 30 or 60 days, those kinds

of violations, as a specific sanction through the disciplinary process.

Q. So you would agree that taking away privileges that have been earned is used as a form of punishment inside Lansing?

A. Through the disciplinary process, it's a form of punishment, yes.

Q. And could you just list for me some of the privileges that you're familiar with being taken away, as a form of punishment? I think [24] you mentioned use of electronic equipment. Could you just list some others for me, please?

A. Are you asking that in the context of the earned privileges program or are you asking that in the context of disciplinary sanctions, or both?

Q. Both, since I don't know.

A. Okay. Through the – the earned privileges program has about nine or ten different privilege categories that offenders can earn from one level to another level. Electronic equipment is one. Opportunity to – expenditure limits at the canteen is another. At different privileges, different expenditure amounts can be made. Visitation is tied to the earned privileges program in terms of hours of visitation. How much you can earn at your assigned job is tied to the earned privileges. At certain privilege levels, you can earn maximum amounts, until you get to the highest privilege level. Then you can earn the highest wage that's possible.

There are certain jobs within the [25] facility, like those with Correctional Industries, that are tied to the

earned privilege system where you have to be at the highest level in order to get those, what we would term, more lucrative job assignments because they pay more.

Those are some examples of the earned privileges. The disciplinary sanctions would be with respect to what equipment you could have in your cell, whether you get the opportunity to go to the canteen to buy things or what things you might be able to buy. There might be a privilege restriction that limits you to basic hygiene items that you could buy from the canteen as opposed to other – like pop or candy or cookies or whatever that you wanted to buy at the canteen. Those would be some that might be imposed through disciplinary sanctions.

Q. Has anyone – have you ever had an inmate who was punished in the disciplinary system by being moved from a medium security facility to – or not "facility" – housing to maximum security housing?

[26] A. Very definitely. A serious disciplinary violation will, we use the term, "bust your custody." It will cost you your custody. And by our classification procedure, you will get sufficient points with that disciplinary violation that it will result in your classification being moved from minimum to maybe even maximum, but certainly from medium to maximum if you get that sort of disciplinary violation. And once your custody is busted, we would not let any inmate who's now, by our classification system, at a higher custody level continue to live in a lower custody setting.

Q. Have you heard about any sex offenders in maximum security, who are housed in maximum security, who were raped in the last five years?

A. I don't know of any by name, no.

Q. Have you – are you familiar with anybody claiming that they had been raped while housed in maximum security because of the fact that they are a sex offender?

A. I don't believe so, no.

Q. You don't take that into consideration at all [27] in your – let me back up.

Do the inmates know what other inmates are convicted of?

A. Only if those other inmates tell them or someone else would tell them. It's not anything that we make known.

Q. Why not?

A. Because it's – it's none of their business. You know, we specifically requested a provision in the Open Records Law that says inmate records are not subject to release to other inmates. That information could cause some problems in management of the facility.

Q. Is one of the problems that sex offenders – in particular, child molesters – could be subject to violence by other inmates?

A. Well, the potential is there for any inmate to be subject to violence by other inmates. You know, the conventional wisdom has, you know, always been that there are – is a hierarchy of offenders in a prison environment and that sex offenders, particularly pedophiles, are at the low end of that hierarchy in the prison environment. Whether that's actually true or not or [28] whether that's

a, you know, long-standing myth, I'm not prepared to say. You know, I don't know – I don't have any information to indicate that sex offenders are singled out to be subjected to violence or rape in a prison setting, and I don't know of any studies that this department has done historically to prove or disprove that particular theory.

Q. Would you agree that it's – I think you said "common wisdom." Would you agree that that is known among the inmate population, that common wisdom you talked about?

A. The – I don't understand the – the common wisdom about what?

Q. About pedophiles being at the low end of the hierarchy as far as inmates go.

A. Again, I don't know if that's the reality or that's a – you know, an understanding that that's the hierarchy. You know, that's a – what I meant by that is, that is a commonly stated perception, you know, among staff and others in the public that I've talked to. We've not done any studies that I'm aware of within the department with respect to inmate [29] attitudes to confirm or disprove that particular theory.

Q. Would you agree that maximum security is a more dangerous environment to live in than medium security?

A. I would – I would agree that the potential is greater for violence in a – or danger in a maximum security.

Q. And is that because that's where the more violent inmates are housed? In maximum security?

A. The more violent inmates would either be in maximum security or they would be in a special management setting where they would be totally segregated from the rest of the prison population.

Q. When you were – strike that.

Have you taken any steps to make sure that information provided by inmates in the SATP is kept confidential?

A. I think that is a specific provision of either the – well, the contract. I think it's either included in the specific language of the contract or in the RFP, which is an attachment to the contract, or incorporated [30] within the contract.

Q. You would agree, would you not, that that information is subject to subpoena by prosecutors?

A. Yes, I would agree with that.

Q. Did you take into account the – strike that.

Were you aware that inmates have expressed Fifth Amendment concerns about the SATP program?

A. I'm aware of that.

Q. Did you take that into account in the – in your approval of the SATP program?

A. We determined that that – we made the determination that that was a – not a valid objection on their part, and certainly nothing that would prevent us from proceeding with the program.

Q. And is it basically your view that this is not a punishment?

A. To make the statement or admit their participation in the – in the offense?

Q. Let me – would you – is it your position that the inmates being – the inmates who do not agree to enter into the program being [31] moved to maximum security, if they are in medium security, is it your position that that's not a punishment?

A. Yes.

Q. And why is that?

A. Well, moving from maximum – custody assignments within facilities are not relocations made for punishment reasons. There's no disciplinary process. A person has no right to be at a particular custody level. And from – moving one person from this custody level to this custody level as a housing assignment all within the context of the total operation of the corrections system is not a punishment. There's no -- there's no discipline imposed. There's no hearing process. There's no rule violation. And it's not recorded as a disciplinary report on their record.

Q. But wouldn't you agree that if the only reason for their being moved is the – because they do not want to admit to their crime, that that inmate is being punished for not admitting to the crime?

A. No, I would not agree with that.

[32] Q. Why not?

A. Again, I don't see housing assignments a form of punishment. I see it as a management responsibility or function that the corrections officials have in getting the

right people in the right places to participate in the programs.

You know, it makes no sense to have someone who's not participating in a program taking up a bed in a setting where someone else who may be willing to participate in a program could occupy that bed and participate in a program. Inmates don't get a choice of where to live. Those assignments are made by the corrections officials, and in doing that, we have to look at the overall management responsibilities and operations that we have in making sure the department runs as best it can.

Q. Isn't it true that the reason that the inmate's housing is – the inmate's participation in the SATP is tied to that inmate's housing situation is to encourage inmates to participate in that program?

A. It's an incentive, yes.

[33] Q. But why not just do it voluntarily? Why not just have this program be totally voluntary?

A. Well, I don't think we'd be fulfilling our responsibility that we have under the statute. You know, we're dealing with offenders who, you know, the information that we have available to us indicates that they have been convicted of a certain offense and that offense and their history involves certain characteristics. And in this particular case, sexual deviancy or sexual violations.

Our responsibility is to make as great an effort as we can, within the resources that we have available, to return that person to the community in a status where they're less likely to commit those offenses in the future. One way we can do that is to have the person participate in a

program designed to address the particular problem that they have. If we do not encourage that participation and allow the person to not participate in the program, then it seems to me that we've failed in that particular responsibility because the [34] person's sentence is served, that person's returned to the community, and the particular problem that resulted in the conviction has never been addressed.

Q. Wouldn't you agree that the first step to treating problems like a person engaging in sexual offenses is the person admitting voluntarily that they have a problem?

A. That's my understanding of the reason for that particular requirement in this program, the form that you showed me earlier.

Q. We talked about the Fifth Amendment earlier. You knew, as a lawyer, that prior to the SATP program being enacted, that you could not punish an inmate for exercising constitutional rights?

A. Yes.

Q. Are you aware of any inmate who has been moved from medium security to maximum security because of a refusal to participate in this program?

A. I believe there have been some. I can't give you any names of individuals, but I believe there have been some. How many, I don't know.

[35] MR. REBEIN: If I can just look through these, I think we're almost done.

MR. DOWELL: Okay. Why don't we step outside.

(Brief recess taken.)

Q. (By Mr. Rebein) I think we talked earlier about the fact that in your view, there was no Fifth Amendment concern here because the inmate had already been convicted of a crime. Is that correct?

A. That's correct.

Q. Are you aware that inmates are also asked to admit to other sexual offenses for which they may not have been convicted?

A. I think their entire sexual history is supposed to be part of this.

Q. So would you agree that – let me just repeat the question. Are you aware, then, that they are asked about other sexual offenses other than the one for which they've been convicted of?

A. It's my understanding that's part of the program.

Q. And is it also your understanding that if those other offenses involved children, child [36] abuse, that the persons in the SATP program to whom that information was given would be required, under law, to report that information to the Kansas authorities?

A. I don't know that for a fact.

Q. Are you familiar with the statutes which require healthcare providers and other professionals who learn about sex – who learn about abuse of children to report them?

A. I know that in general, those statutes exist. Who specifically they apply to, I do not know.

Q. Knowing that those statutes exist and that the inmate is required to give information about other offenses, don't you think that creates a Fifth Amendment concern, even if the inmate's already been convicted of a different offense?

A. Well, our view is that in the treatment context within the corrections system, that the Fifth Amendment would not preclude – those types of concerns would not preclude the type of program that we're operating for sex offenders.

[37] Q. Why not?

A. Because of the treatment context within which the program is offered in the correctional setting. I just don't see that as a Fifth Amendment issue.

Q. Even though the inmate could be prosecuted for those other offenses?

A. Yes.

MR. REBEIN: I don't have anything further.

CROSS-EXAMINATION

BY MR. MADDEN:

Q. Mr. Secretary, in the course of your deposition this afternoon, you've spoken in terms of moving – well, let me back up.

You were asked to examine Deposition Exhibit Number 21, which deals with the transfer of inmates from the medium facility to the maximum facility at the Lansing Correctional Complex. When discussing custody

levels in the context of that exhibit, are you discussing the classification, security classification of the facility or of the individual inmates?

A. Well, the medium – there are two [38] different – two different parts of that answer. There is a medium security facility, and then there are medium security inmates. A medium security inmate can live in a maximum security setting or they could live in a medium security setting. They could not live in a minimum security setting.

So there's a security designation for each living unit or each living area that's part of the system and then there are custody levels for each individual, and the restriction on the individual is that they cannot live in a security setting that is – that is lower than their custody classification level. So there are two different parts of that. One is the security level for the facility and one is the custody level for the inmate.

Q. As the Secretary of Corrections, do you have any reason to believe that a place – the placement of a medium custody inmate inside of the maximum security perimeter of the Lansing Correctional Facility subjects that medium custody inmate to an unconstitutional level of violence?

[39] MR. REBEIN: Object to the form of the question. Calls for a legal conclusion.

A. I don't have any reason to believe that that's the case. There are probably hundreds of medium security inmates today, and probably a good number of minimum security – or custody inmates, that are living in maximum

security settings today, and I don't think those inmates nor the maximum custody inmates are subjected to unconstitutional or unreasonably unsafe conditions.

Q. (By Mr. Madden) As Secretary of Corrections, do you have any reason to believe that the placement of a sex offender inside the maximum security perimeter of the Lansing Correctional Facility subjects that inmate to an unconstitutional level of confinement or undue risk of violence?

MR. REBEIN: Object to the form of the question as calling for a legal conclusion.

A. No, I don't.

MR. MADDEN: I have no further questions of the Secretary.

REDIRECT EXAMINATION

* * *

[41] was a pedophile, that that would create an unconstitutional risk of violence to that inmate?

A. I don't know that it would create an unconstitutional risk in each case. It may in certain cases expose that individual to a risk to their safety. That is not something that would be done within department practice. We certainly wouldn't authorize or condone that type of release to the inmate population. But whether it would create, in every instance, an exposure to unsafe conditions for that inmate, that would be strictly speculation and it would probably vary on a case-by-case basis.

Q. Would you agree that the Department of Corrections and the prison administration cannot control what another – an inmate does with his knowledge about another inmate's criminal offenses?

A. I would agree that we could not control that – an inmate's ability to tell other inmates what a specific inmate had done.

Q. So if an inmate learns about a person's offenses in group therapy, there would be no [42] way to stop that person from telling it to other inmates, true?

A. Other than removing that person from the setting, were we able to ascertain that that inmate was making that kind of disclosure.

Q. And if that happened to be a sexual offense such as a person being a pedophile, you would agree that that would create – could create a risk of increased violence to that – to the inmate?

A. I think the potential is there that it could.

MR. REBEIN: I don't have anything further.

MR. MADDEN: Nothing further. He would like to go ahead and read and sign.

MR. REBEIN: Okay. Great. (The witness was excused.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE,	)	
	)	
Plaintiff,	)	Case No. 95-3266-DES
	)	
-vs.-	)	
	)	
DAVID R. McKUNE, et al.,	)	
	)	
Defendants.	)	

VOLUME I
(Pages 1 through 55)

THE DEPOSITION OF BARBARA L. OWENS, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Friday, October 4, 1996, at the Lansing Correctional Facility, in the City of Lansing, in the County of Leavenworth and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the

District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

* * *

[23] A Many persons with sexual offending behavior will deny their behavior.

Q To have the most effective treatment, the therapist needs to break through that participant's denial, isn't that correct?

A No.

Q So a person could be effectively treated and continue to deny his sexual deviancy or offenses? Is that what you're saying?

A No.

Q Could you clarify your position for me?

A The treatment process is 18 months long. It is important that the person with the sexual offending behavior take responsibility for that behavior. There are certain criteria that need to be met during that treatment process for effective treatment.

Q What do you mean when you say a participant needs to take responsibility?

A A person with sexual offending behavior needs to take responsibility for that sexual offending behavior and be accountable for those offensive behaviors.

Q Part of the program here at Lansing Correctional Facility requires the [24] participant to fill out an official admission of responsibility or admission of guilt form, right?

A It's called a statement of responsibility.

Q Statement of responsibility. Were you involved with drafting that particular document?

A I was involved with drafting the statement of responsibility document.

Q You were?

A Yes.

Q Is it possible to have a program of effective therapeutic treatment for sexual offenders without a written record of responsibility? Can you have a person accept responsibility verbally, without writing it down and keeping it as a record?

A Would it be possible? Is that what you're asking me?

Q Yes.

A Yes.

Q Was there ever a decision-making process as, "We need an actual form that needs to be written down"? Did, at one point, you say – let me stop and ask: Are you aware of some

* * *

[62] Q So no attorney reviewed that, a prison attorney or someone at DCCCA?

A It's possible that an attorney could have looked over this at some point because the forms have gone out to different attorneys. No attorney was inovlved in the planning of this.

Q You mentioned some federal and state laws. Can you state specifically which federal and state laws those are?

A I don't know the numbers of the statutes.

Q Okay.

A But by law, there are certain things that we are required to report.

Q Okay. Could you delineate what those certain things are?

A Mandatory reporting of child abuse is required by law.

Q Is that both –

A Social workers –

Q Is that both state and federal?

A I don't know. I know – yes, I believe so. Court-related – ordered release of records, I don't know if that's a statute. Information needed to protect a third party, I believe that is a law. There was a Supreme Court case on it, I know.

[63] And escape planning and inappropriate relationship – relations with staff, I do not believe those are laws, but it's according to KDOC policy. Harming themselves or others would be related to information needed to protect a third party. I believe that's by law.

Q Do you have somewhere a file of the statutes on confidentiality and disclosure and reporting requirements for therapists and social workers?

A Yes, I do.

Q And that would have the actual federal laws you're talking about and the state laws?

A I believe so.

Q Is there a state law that requires – that makes it a misdemeanor if you fail to report a case of child abuse that you learn of as a social worker or psychotherapist In Kansas?

A I don't know if it's a misdemeanor, but people are required to report.

Q But I'm asking is there a state law that says if you as a social worker or psychotherapist or psychologist learn of an instance of child abuse and you don't report it, that you can be held to some form of criminal penalty or criminal charge, be it a misdemeanor or felony or something?

[64] A I don't know about that. I know I could lose my license.

Q Okay. Now, you stated at the preliminary injunction hearing that all of your SATP files are subject to subpoena.

A Yes.

Q Do you recall saying that?

A (Nods head yes.)

Q Could you tell me what you meant by that, what that – what you mean subject to subpoena? What's your understanding?

A That the SATP files, if we were under court order or if they were subpoenaed, we would be required to turn them over.

Q Okay. And you'd have to obey that subpoena?

A It's my understanding.

Q Okay. Have any of your files in the SATP since you've been in charge of it been subpoenaed?

A No.

Q Have any files in the SOTP before been subpoenaed?

A Not that I'm aware of. Not that I was aware of.

Q Have you ever heard of an instance where files of a therapist have been subpoenaed for information about –

A Yes.

[65] Q Can you give me an example?

A I need to correct that. I believe there was one instance since I have been back that the Court – we did have a court order to have – that the attorney did come up and review the files, and that was a subpoena, court order.

Q Do you know when that was?

A I'm going to say a year or so ago.

Q Was that a case somewhere in Kansas?

A Yes. I believe it was a sexual predator hearing.

Q Did that involve Nancy Orrick, by chance, as the attorney?

A Yes.

Q And she went to court and got a subpoena to look at those documents?

A I believe so.

Q And the file that they're allowed to look at, that would include the therapist's report of the inmate who's involved with the SATP?

A Yes.

Q It would involve their sexual history form that they filled out?

A At that time, I don't know if that particular case had a sexual history in it because the program has changed, and I do not know when that – what [66] program that person was under.

Q Okay. In general, though, an inmate's file who's involved in the SATP, their sexual history form would be in there?

A It could be, yes.

Q Okay. Is it likely that it would be?

A Yes.

Q An analysis or interpretation of the plethysmography results would be in there?

A It could be, yes.

Q Their analysis, interpretation of their polygraph?

A It could be.

Q Is it possible that you would have the videotape of their group discussions in their file?

A No.

Q Why is that?

A The videotapes are viewed by either the program consultant or the Psy.D. psychologist or myself. The feedback on those tapes are given to the therapist. Sometimes they are shared with the group and the tape is erased. The only – in all likelihood, if it was mentioned in the progress notes, it would just be the group was videotaped, feedback shared with the group.

Q So does a group – is it possible that a group

* * *

[69] members. That has been – that has been the case.

MR. DOWELL: Off the record just a second.

(Discussion off the record.)

Q (By Mr. Byrd) Part of the limits of confidentiality form that's marked as Deposition Exhibit 7 states that you cannot guarantee inmates will keep – other inmates involved in the program will keep things confidential, correct?

A Correct.

Q And if an inmate releases confidential information, they're kicked out of the program, is that correct?

A At times, yes.

Q That's not an across-the-board policy?

A Yes, it is.

Q Have there been inmates who have released confidential information but have not been kicked out of the program, without naming any names?

A There have been some that have been accused of breaking confidentiality that have not been kicked out or terminated from the program as there was conflicting information given from other inmates.

Q Has any inmate been kicked out of the program for release of confidential information?

A Yes.

[70] Q How many inmates have been kicked out, can you estimate?

A I would – in the last two years?

Q Sure.

A Approximately maybe three.

Q Do you know who they would have released that confidential information to? Is it to other inmates? Is it to spouses?

A It's my understanding other inmates.

Q No. 4 on Exhibit 7 states that the confidentiality of the program is not limited to information – quote, information needed to protect participants from harming themselves or others, closed quote. What does that mean?

Could you provide some – that's No. 4. Particularly what I'm interested in there is the "others." Who else would need to be protected?

A Could be other Inmates.

Q Could it be other citizens out in –

A It could be staff. It could be if there was a specific person we felt needed to be protected. Those would be the instances.

Q Who's the one who makes the ultimate decision on whether information is kept confidential in this program? Is that your decision to make?

* * *

[84] videotaped. After that, most of them feel more comfortable, and that has never been their stance throughout the whole program.

I do not know what would happen if it was their stance throughout the whole program because we have not had to deal with that.

Q So no one's revoked videotape consent that you're aware of?

A That I'm aware of, since I've been back, no.

Q What are some of the reasons why they don't want to be videotaped?

A Some of the reasons that I have been told, they wonder where it's going to be. Some people do not feel comfortable being in front of a camera. There have been those that have said they have an aversion to cameras, are very paranoid around that.

Q Has anyone ever stated that they don't want to be videotaped because they don't want to have a record of what they say on videotape?

A That could be the case, yes.

Q Have you heard of any instances where that's – that someone has raised that?

A Not to me, no.

Q We were talking about – or you mentioned – actually, I mentioned inmates fill out sexual [85] history forms. Is that something they do at the beginning of their program, their involvement with the program?

A Generally, it's started in the first three months of the program.

Q And it's something – is it something they're required to do?

A It's something that's part of the treatment program.

Q Okay. If an inmate was involved in the program and said I don't want to fill this form out, what would you tell that inmate?

A I would expect that form to be filled out at some point during the program.

Q Okay.

A Generally, there may be resistance to some of that in the beginning of the program. We expect that in a lot of cases. As the program progresses and that participant progresses, there have not – there has not been anyone that has refused to do that.

Q At some point, though, before they complete the program, the 18-month program, it's fair to say that they're required to fill out –

A Yes.

Q – the sexual history form?

[86] A Yes

Q They can't complete the program without filling it out at some point, is that correct?

A That would be correct, accurate.

MR. BYRD: I'm going to mark this as Exhibit 9.

(EXHIBIT NO. 9 WAS
MARKED FOR IDENTIFICATION.)

MR. BYRD: This as Exhibit 10.

(EXHIBIT NO. 10 WAS
MARKED FOR IDENTIFICATION.)

Q (By Mr. Byrd) Miss Owens, I'm going to give you Exhibit 9, ask you if you recognize that document.

A This is – this is an – it says an abbreviated sexual history form that is used for SATP.

Q Is it currently being used in your program?

A I don't know that each person uses this exact form. I believe this form was started with the use of the polygraph testing. I don't know that the – each facilitator goes by this. This is what this was used for at that time, was for self-disclosure during a polygraph testing program, part of the program.

Q Does it say somewhere on this document that this is involved with the polygraph?

A I don't know. I would have to read through all of it to say if it was for the polygraph only.

* * *

[89] Q Tell me how many files we're talking about here. You have a separate treatment file, is that correct?

A Yes. We have – there's two different files. We have the treatment file and then there is a separate file kept on their physiological testing, two different files.

Q And the physiological testing, that indicates the plethysmography and polygraph?

A Yes.

Q Anything else?

A No.

Q Mike Parsons you stated put this together, is that correct?

A I believe he was the one that began the draft on that based on other forms that he had received in his training for polygraph and plethysmograph testing.

Q Did you review it?

A Yes. We all reviewed it, the treatment team, people in the program.

Q This sexual history form, this pertains to incidences besides those for which you were convicted of sexual – what does sexual history mean? Why don't we do that?

[90] A in relation to this form, this would be the offense that they are charged with.

Q Only the offense they're charged with?

A That's what it could be, yes. Sexual history form as far as what many of the therapists use during the treatment process is a time line of their sexual experiences throughout their life.

Q Okay. Where on this form does it state that this applies only to their conviction?

A Says offending behavior. Basically, when we talk about offending behavior, it's in relation to that, their conviction, in relation to the testing.

Q Outside of the offending behavior headline here on this form, where else on this form does it state that this only applies to the conviction which you were charged with?

A It doesn't.

Q Will you read that first paragraph right there of the form?

A Yes. "Part I of your sexual history refers to the number of victims you have molested or otherwise offended against. You must think back to anyone or any situation that involved a lack of consent. Remember, this section applies to those sexual activities where you were the perpetrator and a [91] victim was involved.

"Each victim must be discussed separately. Answer these questions for the first victim and then start over on a new page for each additional victim. If you have any questions, refer back to the instruction sheet and/or ask for clarification. If you need more paper, let us know."

Q The paragraph states, " . . . this section applies to those sexual activities where you were the perpetrator and a victim was involved." Based on that language, that could apply to other situations for which you were not convicted – for which the inmate was not convicted?

A That's correct.

Q And this document states, " . . . your sexual history refers to the number of victims you have molested or otherwise offended against." That can include people, victims which you were not convicted of?

A That's correct.

Q This document, an inmate filling it out who's been involved in your program, he could include other victims that he molested, offended against or raped that have nothing to do with his conviction?

A That's correct.

[92] Q And he's required based on the language of this program or this document to include other sheets of paper, if necessary, to list all of those people he's molested, offended against or raped, is that correct?

A You say he's required to?

Q Well, based on the language of this document. I think the language says, "If you need more paper, let us know. Answer these questions for the first victim and then start over on a new page for each additional victim."

Does that mean that if you have other victims, even those which you haven't been convicted of, that you need to fill out this information on other sheets of paper?

A It means they could, yes.

Q Okay. That document – or excuse me. Exhibit 10, let me see if you're familiar with that program – that document, and tell me what it is if you are familiar with it.

A It says Sexual Abuse Treatment Program, Abbreviated Sexual History Form. I believe this is a form that Mike Parsons uses in a physiological testing component.

Q Is that a form that's currently being used in

* * *

[99] sexual histories, that would have to be reported, and that would be reported.

Q What about if they include having sexual relations with another inmate? Is that something that you would report?

A Be something that would in all likelihood be dealt with in group first or individually with that inmate.

Q But would it be something that eventually would get reported at some point?

A I don't know.

Q Would you report it if there was evidence in someone's sexual history that they were having an ongoing relationship with another inmate sexually?

A Are you talking consensual or non-consensual?

Q I'm thinking of a situation where an inmate is being raped against his will.

A That would be reported.

Q Who would you report that to?

A I would report that to KDOC.

Q What other purposes are the sexual history forms used for? Are they used in group therapy at all?

A There are those times when a participant will share their sex – will share their sexual history with the group. That can be very important to the [100] treatment process. There are those that are very committed and motivated in order to do what they need to do in order to never reoffend and be safe in the community.

They are generally the ones that will do whatever they can to be aware of their cycle, to be aware of how – how their sexual history had a part in them getting to prison.

Q Is this sexual history form – is it something that would be shown to other participants in the program, other inmates?

A No.

Q Never, not even during group therapy?

A Not unless that inmate so chose to do that.

Q Would information on the sexual history form – would that be used by Mike Parsons to formulate questions?

A That could be used by Mike, yes.

Q For both the polygraph and/or the plethysmograph?

A In the plethysmograph, usually, there are no questions asked.

Q I want to mark as exhibit –

MR. BYRD: Exhibit 11.

(EXHIBIT NO. 11 WAS MARRED FOR IDENTIFICATION.)

Q (By Mr. Byrd) Miss Owens, have you – I want you

* * *

[108] about those. I think you referred to in a previous deposition that inmates are required to fill out a form accepting responsibility.

A A statement of responsibility, yes, or admission of responsibility.

Q Is there a difference between an admission of responsibility and an admission of guilt?

A Just in terms.

Q Just –

A My understanding is guilt is a legal term. Responsibility is not.

(EXHIBIT NO. 12 WAS MARKED FOR IDENTIFICATION.)

Q (By Mr. Byrd) Miss Owens, I ask you if you recognize that and if you can tell me what that is.

A Yes. Says SATP Admission of Guilt. This was the form that was first used before we changed it to admission of responsibility.

Q So that's no longer being used in the program?

A No, this is no longer in use.

Q Was that used when you first started here?

A Yes.

Q When was it charged?

A I do not remember exactly when it was changed.

Q Was it changed this year, in 1996?

A Yes, I would believe so.

[109] Q Changed in the summer or spring?

A I think it was probably changed in the spring. I don't exactly remember when, it was changed.

Q Were you involved with the decision in having it changed?

A Yes.

Q Who else was involved with that decision?

A Michael Woods.

Q Who is he?

A He's the coordinator of the SATP program in the Hutchinson Correctional Facility.

Q So he's your equivalent there?

A Yes.

Q Was anyone else involved?

A We talked it over with my bosses at DCCCA. We talked it over with the DCCCA attorney.

Q Who is that DCCCA attorney?

A John Knox.

Q Okay. I don't know if I've seen that actual document, admission of responsibility.

MR. DOWELL: We can go off the record.

(Discussion off the record.)

Q (By Mr. Byrd) Will you look at both Exhibit 4 and Exhibit 12 and explain to me the difference between the two?

[110] A There's a difference in wording. Exhibit 12 says admission of guilt. Exhibit 4 says admission of responsibility. There's also a difference in the wording on the forms.

Q Uh-hum.

A They both require a signature of the participant and the date and a witness, which is – and a date, which the witness is generally the person that does the orientation to the program or the participant's facilitator.

Q Outside the change in the word from admission of guilt to admission of responsibility, substantively, is there anything that you can tell different between. the two forms?

A Uh-hum. In the admission of responsibility, there's also a statement on there that says, "I realize SATP is on my IPP and is a voluntary program."

Q And that's not on the admission of guilt form?

A No. And there's a difference in wording that says, "This document will serve as my official admission of

responsibility and my need for treatment" on Exhibit 4. My need for treatment is on – is not on Exhibit 12.

Q And if I could summarize, the difference between [111] the two forms besides the words responsibility and guilt is that the admission of responsibility form includes a statement that this is a voluntary program and the second other difference is that this is a – the admission of responsibility form states that this is the official admission of responsibility form and need for treatment? Those are the differences that you see?

A Yes.

Q Okay. So before the admission of responsibility form was used this year, would the same information be included on both forms?

A Basically, yes.

Q Okay. I found Exhibit 11. I think that's what we were getting into before we took a break. Page 2 of the exhibit, No. 1 states, "I agree to voluntarily take a plethysmograph examination, having had the procedure explained to me by the examiner."

Outside of medical reasons, if they had reasons such as – any other reasons, can they refuse to take – I mean, they're required to take the plethysmograpy?

A It's a, yes, program criteria. There have been those that have – refused may be too strong a

* * *

[114] mean by that? Could you explain that?

A There are criteria for each phase of the program – the first three months of the program, the next twelve months of the program and then the final three months. If that person is not meeting that criteria, they are not seen to be progressing through treatment.

Q So can you give me an example of someone who has been terminated from the program for failing to progress without naming any names?

A There have been those occasions when someone was terminated from the program for failure to progress in treatment. They were not involved in the treatment process, would not do the treatment involved, would not work on their – on their deviant sexual cycle, did not express or would not do anything in relation to having empathy for the victim.

There are those that perhaps would not do anything as far as a relapse prevention plan, that were very resistant to doing any of the work that is seen as lack of progress.

Q Would lack of progress include someone who steadfastly adhered to their innocence of the actual crime of which they're convicted?

[115] A That would be continued denial of the offense. Yes, that would be.

Q And you could be terminated from the program for that?

A Yes.

Q Oh, that's No. 3, continued denial of offense.

A Yes.

Q Okay. Would refusal to fill out a sexual history – would that be something that would be taken into account for failing to progress in treatment?

A Could be, yes.

Q Can you refuse to take a polygraph test?

A You could refuse. A continual – a continual refusal would be real similar to on the PPG. Someone could come in and say I don't want to be tested today. That person, in all likelihood, would be given another chance, would set up an appointment to be polygraphed, and that would not be read as a refusal to be tested.

Q For example, in Deposition Exhibit 11, on the plethysmograph examination protocol, No. 4 states that I also understand that this may be grounds for termination from the program if they refuse. Isn't that what No. 4 states?

A Yes, it does.

[116] Q So refusal from the program can be grounds for terminating someone from the – or refusal to take the plethysmography can be grounds for termination from the program?

A Could be, yes.

Q Same way with the polygraph, is that correct?

A Could be, yes.

Q You have them fill out a form when they're terminated from the program?

A If possible, yes.

(EXHIBIT NOS. 14 AND 15 WERE MARKED FOR IDENTIFICATION.)

Q (By Mr. Byrd) Miss Owens, I'm handing you Exhibits 14 and 15. First, do you recognize those?

A Exhibit 14 is our Sexual Abuse Treatment Program Dismissal Prior to Completion. This is the form that is used when someone is dismissed or terminated from SATP.

Q Is that currently being used now?

A Yes.

Q Okay. And Exhibit 15?

A This is marked Sexual Abuse Treatment Program Termination Prior to Completion, Exhibit 15.

Q Is that currently being used in the program?

A Yes.

[117] Q How are those two different, if they are?

A Exhibit 14 is the one that we use basically when the person is dismissed by the program. Exhibit 15 is one where a person chooses to self-terminate or dismiss themselves from the program.

Q And these are forms that you have them fill out when they – when they terminate from the program?

A Yes.

Q On Exhibit 15, I'm going to ask you to explain something. "Although my failure to follow the advice I

received may affect my parole eligibility status, I nevertheless choose to terminate my commitment to this program. I assume the risks and consequences involved with this decision."

First of all, who drew up these programs – these documents, Exhibit 15 and 14?

A I believe these have been in use throughout the history of the program. I don't know exactly who would have drawn them up. Could have been Michael Woods and myself. This one's marked 9-1-91. I don't – Exhibit 14 is marked at that date. I do not know who all went in to drafting the documents.

Q Okay.

MR. BYRD: Let's mark this as Exhibit 16. (EXHIBIT NO. 16 WAS MARKED FOR IDENTIFICATION.)

Q [118] (By Mr. Byrd) Are you familiar with that document, Miss Owens?

A Yes. Exhibit 16 is an SATP refusal to submit to treatment form.

Q How are these three, 14, 15 and 16 – how are they different, or are they essentially the same?

A No. Exhibit 16 is a refusal to submit to treatment and refusal to enter the program. Exhibit 14 is when a participant is dismissed or terminated from SATP by the program after he is in the program, and Exhibit 15 is when the participant chooses to terminate himself from the program.

Q Okay. In Exhibit 15, there's a reference to assuming the risks and consequences involved in the decision. What does that mean? What's that a reference to, in your understanding?

A In my understanding, it is a reference to if someone – that there could be consequences to them dismissing themselves from the program.

Q What are some of those risks and consequences?

A They could lose good time. They could not be looked upon favorably by someone not doing the program.

Q By? Who would look unfavorably upon them?

A I don't know who.

Q [119] Would the Kansas Parole Board?

A That's a possibility, yes. There could be a loss of level. There could be consequences.

Q Okay. Why not make the program, the SATP program, mandatory?

A That would not be SATP's decision. It's my understanding that would be a decision that would be made at the Department of Corrections level.

Q Okay. If they came to you and asked for your input, why would you choose to make a program voluntary over mandatory given your – they come to you, given your experience with dealing with sexual offenders and your educational background and your career development of dealing with people like this, and they asked you, "We need to decide whether to make it voluntary or

mandatory. What's your thoughts?" What would you tell them?

A I would tell them that I think every sex offender needs treatment of some sort, but also tell them that not all sex offenders are appropriate for treatment; that I would prefer that the SATP program now that is in place remain voluntary, but I think some sort of treatment for all sex offenders should be mandatory, whether that be through mental health or through another program,

* * *

[124] Q I may have asked you this once before, but I just wanted to make sure. When I was asking you questions about the inmates' files in the SATP when they're subpoenaed, have they ever been subpoenaed, do you know, to your knowledge, down at Hutchinson by anyone?

MR. DOWELL: I'm going to object to the – which files? Maybe clarify that.

MR. BYRD: Oh. I'm talking about the treatment files involved in the SATP.

THE WITNESS: I don't – I don't know about those at Hutchinson.

Q (By Mr. Byrd) Do you –

A I would not be the one to answer that question.

Q I'd have to ask the person at Hutchinson?

A Yes, because I don't know.

Q On the polygraph, it's possible, is it not, that an inmate could be asked questions about other incidences

of sexual offenses other than those for which they were convicted?

A That could happen, yes.

Q What's the name of the person down at Hutchinson?

A Michael Woods?

Q Who's your equivalent?

A Yes.

* * *

[126] A For a brief period of time, yes.

Q Do you know where he is now?

A Yes. Tom is employed by Bert Nash Mental Health Agency.

Q Is that in Wichita?

A No. That's in Lawrence.

Q Without naming any names, if possible, have you ever been confronted with a situation where inmates have complained about receiving different interpretations of their plethysmograph results?

A Have I been involved in that?

Q Have you ever heard of that happening as part of the SATP program here at Lansing?

A Yes.

Q Has that happened frequently?

A No.

Q Can you give me some background to those circumstances?

A As I remember it, there was some concern at one time at receiving somewhat different interpretations of a PPG.

Q Are you suggesting that that's only happened once?

A Yes.

Q So, as far as you know, there's only been one instance of an inmate complaint?

[127] A Yes.

Q For terms of defining what a sexual offender is, how do you define what a sexual offender is? Do you simply go by whether they've committed a criminal act or charged criminally, let me put it that way?

A You're talking about a sexual offender within the Department of Corrections?

Q Yes.

A Well, I define a sexual offender as a person who has a sexual offending behavior against a child or adult.

Q What's your definition of a child, for example? Do you have an age restriction? Let me ask you this: If a 25-year-old man had sex with a 17-year-old woman and it was consensual, would that man have committed a sexual offense that would need treatment, in your experience, in your background, in your training?

A Are you saying it was consensual sex?

Q Uh-hum.

A I don't know what the exact age as far as when a female – I believe it's 16. I'm not sure.

Q That's my understanding.

A Sixteen?

* * *

[130] Q Were you involved with the sexual offender treatment program, the SOTP?

A Yes. I was a therapist for two years under Weldy Associates.

Q When did it become the SATP? Is that when it started under DCCCA?

A No. DCCCA had the contract with SOTP, I want to say, from July of '91 through October of '94. At that time, it was still SOTP. I was involved for – I worked for DCCCA for a year at that time and then left.

Q Do you know, through your involvement with the SOTP and as a therapist, if a person refused to enter into the treatment program, were they moved to maximum security or was that a possible consequence, do you know?

A You're talking like in 1991?

Q Uh-hum, back under the SOTP.

A I don't know. I don't remember.

Q Who is Mike Parsons' supervisor for – you're his supervisor on the whole, right?

A Yes.

Q Who supervises him in his analysis and interpretation of plethysmography results, or is he the –

[131] A Mike consults with other plethysmographers and polygraphers if he needs to.

Q Do you know –

A He consults with Dr. Robert Card on plethysmography. On the polygraphy, I believe he consults at times with Gary Davis and with some people in Oregon where he went to his training.

Q But he has no one here in the program who you would say supervises him in his interpretation and analysis of the program?

A No.

Q I don't think I have any other questions. That wraps it up.

A Thanks.

Q Sure.

MR. DOWELL: She'll want to read and sign.

(Witness excused.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE,

Plaintiff,

Case No. 95-3266-DES

-vs.-

DAVID R. McKUNE, et al.

Defendant.

VOLUME I
(Pages 1 through 208)

THE DEPOSITION OF MICHAEL J. PARSONS, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Friday, October 4, 1996, at the Lansing Correctional Facility, in the City of Lansing, in the County of Leavenworth and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

* * *

[122] them during the time they're in our unit for a regular program, I will go down to the education room at the beginning of the day and just call that particular inmate out and we will go down to my office for the assessment.

Q While we're on the subject, let's – are there any countermeasures that you have witnessed an inmate take to try to alter the results of the plethysmograph?

A That I've witnessed? No.

Q That – have you ever had concerns about a particular inmate altering the results of the plethysmograph?

A Yes.

Q Tell me the types of things that you were concerned about.

A Excessive masturbation prior to. Masturbation during. Use of drugs or alcohol prior to. Actual touching of the gauge. Touching of themselves. Failing to self-report to the appropriate places during the assessment. Failing to report accurate information on what they had just been administered through – audio tape-wise [123] through the head set. Several of these are on participant verification, that they reported that these things were things they did. Not listening to the tape. Negative self-thoughts. There's mumbling, talking to their penis, singing songs. There's several occasions. Counting backwards.

Q Anything else?

A That would be a beginning list I can recall right now.

– Q Let's go through it quickly. Would you agree that if an inmate masturbates just prior to the exam, that that has an effect on the plethysmograph exam?

A It could.

Q Would you agree that that would affect the reliability of the – of your interpretation of the exam?

A It would be dependent on an individual case, but it could.

Q Okay. What about you said that some inmates try to do it during the exam?

A Uh-huh. Yes.

Q Is that where somebody is not excited by a particular sequence but is trying to get [124] excited by it?

A Yes.

Q Has that occurred during your administration of an exam?

A I've not had a verification where the inmate has said, "Yes, that's what I was doing." I've had verification saying, "Yes, I was trying to enhance a response or to create a response."

Q In those occasions, were you suspicious that it had occurred?

A Yes.

Q Are they videotaped?

A No.

Q Why not?

A Privacy.

Q Can you see them through the window?

A No.

Q For privacy reasons?

A Yes.

Q Would you agree that masturbation during the exam affects its – would affect the reliability of the results from the exam?

A I wouldn't agree on the reliability. I would look at that as a countermeasure which would [125] question – whether I would look at it – how valid it would be, how true the responses were.

Q Okay. I think you've separated out reliability. Can we call that validity of the exam? Of – not of the exam, of the results of the exam.

MR. DOWELL: Can we –

MR. REBEIN: Yeah. Let's take a break.

(Brief recess taken.)

Q (By Mr. Rebein) Can we – I want to get the right terminology. Can we agree that masturbation prior to the exam and during the exam affects the validity of the test results?

A It would affect the results of the test results.

Q But would you not agree that it would affect the validity of the test results?

A Yes, I would agree that it would affect the validity of the test results.

Q What about use of drugs? First of all, explain to me how use of drugs can affect – have an effect on an exam.

[126] A Depending whether a person's under the influence or not can be a determinant on what type of response is made or –

Q Have you read any studies that indicate that somebody who was intoxicated on alcohol would not – might not respond to certain stimulus the way someone who wasn't intoxicated would?

A No.

Q What's the concern with drugs?

A The – the protocol that we follow in recommendations I've read is we don't test someone who may appear to be under the influence of drug or alcohol.

Q Do you do a drug or alcohol test just prior to the exam, to make that determination?

A No.

Q Why – what's your understanding of why you wouldn't want to do an exam on someone who was under the influence of drugs or alcohol?

A My role in that would be part of the program is based on their honesty and how honest they're being with themselves and with us in treatment, and I would take their word for that. The other thing is, I don't have the [127] facility to do a drug screening test in my office before each exam.

Q I think you've misunderstood my question. What would you be concerned about as far as giving an exam to somebody who's under the influence of drugs or alcohol?

A That would depend on what they may be under the influence of.

Q Say alcohol.

A I – I still couldn't answer that because I'm not sure how that participant would respond under the effects of alcohol.

Q I understand that. I'm just asking you what – what you understand the concern to be about people who are under the influence engaging in the test.

A Okay. I would be unable to answer that because I would not administer a test to someone who appeared to be under the influence of alcohol.

Q Okay. Have you read the literature about – any literature about whether or not drugs or alcohol can affect the validity of the test results?

A No, I have – I cannot say I've read any [128] literature around that. The literature I've read is, they recommend not testing or administering the test.

Q But you don't understand why they make that recommendation?

A Due to the possible effects it may have on the assessment if they're under the influence.

Q But you don't know what those effects are?

A Not particularly.

Q Well, do you or don't you?

A Not particularly. Depending on the drug. If it was a depressant, would it cause a low arousal? If it was something, would it enhance the arousal?

Q Right.

A Would it –

Q I'm trying to get from you your understanding of what –

A Uh-huh.

Q – effects these drugs can have.

A It would depend on the drug.

Q Okay. Alcohol?

A I would be unsure of that, depending – without knowing that person. I cannot answer [129] that question without knowing the individual.

Q Okay. Depressants?

A Same thing.

Q Marijuana?

A Same thing.

Q Cocaine?

A Same thing.

Q Is there any drug that you would know what the effect would be?

A Not directly because I'm not sure how that chemical would mix with that individual and how that person would respond to it.

Q What about you said touching the gauge?

A Uh-huh.

Q Would you agree that touching the gauge could affect the validity of the test results?

A I would say it would alter the test results.

Q Well, if it alters it, doesn't that affect the validity?

A It could on that particular stimulus.

Q So can we agree that touching the gauge affects the validity – could affect the validity of the test results?

A Of certain parts of the test results.

[130] Q So let me ask it again. Can we agree that touching the gauge can affect the validity of certain parts of the test results?

A Yes.

Q What about – can't read my own writing I have touching of themselves. I guess that's what I've written down. Have you – would that fall within the category of masturbation during the exam?

A No.

Q Okay. Explain to me the difference.

A We've had participants report that they've squeezed themselves during an arousal in order to lower that arousal. It would more closely fall into the touching

of the gauge, where they would squeeze the gauge shut. In that case, they would squeeze their penis and the gauge shut at the same time. Or they would pull on their penis, therefore trying to stretch it out to make it longer.

Q Would you agree that touching of themselves in the fashion you just described could affect the validity of the test results?

A If they – certain parts of the test, yes.

Q Okay. And let's be clear. When I say [131] "affect the validity of the test results," I am – what I mean is affect the validity of any part of the test results.

A Okay. If any part of it, yes, it would.

Q Back to the drugs, do you know whether insulin – or what the concern is about testing someone who's on insulin?

A I'm not a medical doctor, but we have all the men screened medically by a medical doctor who works – or is contracted by our organization, and she determines whether medically they will be tested or not. I have no –

Q I understand that. But do you know whether there's a concern about testing an inmate who has – is on insulin?

A If they are noted with diabetes, I will take that – and they were using insulin for that reason or for other reasons, I would take that into consideration.

Q All right. My question is: But do you know why that you would – well, would you give a test to an inmate who was on insulin?

A If they were medically cleared.

Q Have you read in any of the literature

* * *

[138] Q Did that individual go ahead and start self-reporting?

A For the most – I've never had an individual go through the entire assessment without self-reporting.

Q You mentioned failure to report accurate information. Tell me what's happening when somebody does that.

A At random, I will talk to the individual over the headset. We communicate over a headset. And I'll ask them to describe what they just listened to, and if they are not even close to what they've just listened to, I take that as inaccurate self-reporting of the information. For example, if they listen to female infant and they tell me they just listened to a 14-year-old boy, there's obviously something going on that they didn't hear the – or weren't listening to the –

Q I think the two things we've just talked about – and correct me if I'm wrong or tell me if I'm correct, I guess is a better question – the two things we've just talked about have to do with making sure that an inmate is concentrating on the audio tape and [139] not blocking it out and trying to think about something else?

A Those are two – yes, those would be two areas that we use to ensure, as much as possible, that they are paying attention to the assessment.

Q Is there a term you would use for someone who is trying not to pay attention to the audio tape?

A There – there wouldn't be a term. It would be determined on everything that's going on.

Q Okay. Would you say that person is blocking it out or is there some other term that you'd use?

A They may just not be paying attention. They may be uncooperative. They may not be willing to take the assessment at that time.

Q Let me ask you whether you would agree that someone blocking out the audio tape and not paying attention to it could affect the validity of the test results.

A Could affect, yes, certain parts of the test results.

Q You talked about negative self-thoughts.

A Uh-huh.

[140] Q Is that where someone would associate an image that might arouse them with something that repulsed them?

A It could be. It would be dependent on the individual, once again.

Q Would that be – would someone do that, what I've just described, in order to keep from getting an erection on a particular segment that was arousing?

A I have had individuals state that they thought of negative things when they knew an arousal was becoming apparent.

Q If someone engaged in negative self-thoughts, as we've just described them, would that – that could affect the validity of the test results, correct?

A It could.

Q You mentioned that you've witnessed people talking to their penis?

A I have – I guess through the headset, I've witnessed them talking to their penis.

Q What's going on there?

A "Go away." "What are you doing, you son-of-a-bitch?" "Go down." "how come you're standing up again?" "This doesn't [141] look good." They have made several comments talking to their penis over and over again.

Q Does – what's – what is your understanding of why they would do that?

A I wouldn't be able to answer that unless they think that by doing that, it would make them more aware that they maybe should not be getting aroused to a certain tape that they're listening to. I can't answer why they talk – talk to their penises.

Q Would you agree that if someone was able to talk to their penis successfully, that that could affect the validity of the test results?

MR. DOWELL: I'm going to object to the form of the question. You haven't defined what successful speaking to the penis is.

Q (By Mr. Rebein) If somebody was able to use that method to keep from getting aroused on a particular portion of the tape that was arousing them, I want you to assume that they could – would you agree with me that that affects – would affect the validity of the test results?

* * *

[149] Q Is it less than half?

A It – it would depend if it was – if it was needed or not. There has never been a time that I have not recalibrated when I needed to recalibrate. If I have a – what I would say a flaw-free assessment or a good assessment with no changes, then I wouldn't – there's no need to recalibrate.

Q But you don't know how many – you wouldn't be able to tell me how many times?

A Not – not sitting right here today. I'd have to go back and look at each individual.

Q Back to our progression through this procedure, I think we've talked about calibration and we may have missed a step. We talked about the procedures for bringing somebody in, correct?

A Correct.

Q And the calibration. Is there a step in between those two where you give more information?

A Yeah. When – when the participant comes into the office is when we begin going over this packet here.

Q Exhibit Number 2?

[150] A Exhibit 2, yes. And we begin going over the first three sheets or – three sheets of that packet. At that time is when, once again, they're offered plenty of opportunity to discuss any concerns, any questions. They are shown the lab at that time, where they're going to sit. They're shown the rest room, those three forms, the disinfecting process. We cover that on what's going to happen with the gauge. They have opportunity to either accept the disinfecting process or request a witness that the gauge be disinfected right there in front of them.

I'm trying to think of other things that happen in that time frame. At that time they're also instructed how to measure. They are then taken in the lab, like I said, and shown the actual area. Then they go back in and measure, and this is all done before the actual calibration takes place. They are – this is the time also that – with the consent form and the protocol, if they do not sign those, then I cannot test them and they are just released from – from the office and I report that to the clinical team.

[151] Q Is there anything else that happens before the test itself that we haven't talked about? Any other step in the process?

A Before the actual assessment?

Q Yes.

A After I take – after I calibrate the gauge, then the gauge is taken in to the participant. He's instructed where his pants need to be, where to place the gauge, how to place the gauge. The galvanic skin response sensors are placed on the fingertips.

Q Let's stop there. What do those do?

A The galvanic skin response sensors do various things. They sometimes show arousal, similar arousal patterns to what we see on the gauge that is connected to the penis. They indicate, at times, when someone is trying to suppress a reaction. They also indicate possibly when someone is trying to enhance a reaction. If someone takes that hand and is masturbating with it, I definitely can tell by those movements.

Q What does that skin response test, though?

A It – depending – it's a resistancy, and I don't care to get into the exact operation or [152] the procedure, based on some things around the procedure.

Q I'm not following you.

THE WITNESS: Can I speak with you?

MR. REBEIN: Sure.

MR. DOWELL: I think that would be appropriate.

(Brief recess taken.)

MR. REBEIN: Are we okay?

MR. DOWELL: Yeah. I think that he misunderstood the nature of the question.

Q (By Mr. Rebein) Okay. What does the sensor, skin sensor, what is that measuring?

A It measures a – kind of a resistance of electricity in the body.

Q Does – and does that go into the test results somehow?

A It's printed on the chart that – the printout chart of the assessment.

Q Is that part of your assessment?

A Yes. The participants, the inmates see the exact same thing I see that's printed out across the computer screen.

Q Does it measure the level of blood flowing through the – your hands or what is it [189] there.

Q Do you ever ask an inmate about sexual offenses other than the ones that they've been convicted for?

A I would ask inmates on the frequency of sexual offense, the number of times, "Did any other sexual acts take place other than what you've reported."

Q What about with other – other people – people other than their victims? Do you ask questions about that?

A Other –

Q Let me give you an example. Say someone has been convicted of rape.

A Okay.

Q Do you – you've tested men who have been convicted of rape, haven't you?

A Yes.

Q Have you ever asked someone who's been convicted of rape about whether they have sexually assaulted a person other than the person – other than the victim for whom they were – received a conviction for sexually assaulting?

A Yes, I would ask an individual that.

[190] Q Is that frequent? Is that frequently why you're giving – one of the questions on the polygraph exam?

A Not – number of times or other victims would be a normal question or a frequent question, just to rule out and to determine the level of possibly how honest they're being in treatment and how – how many times they may or may not have done what they've done.

Q Has anyone ever disclosed to you that they had, indeed, committed other sexual offenses?

A Several.

Q And what did you do with the information?

A I did nothing with the information except refer that back to their facilitator or their therapist/counselor, "This is what the man reported."

Q Have you ever asked for the person's name?

A I would ask for any – if the person would come to me and say, "Yes, Mike, there has been other victims," I would want to ask for some sort of identifying information, whether it's a name or a letter or a nickname, just so I can keep the individuals apart.

[191] Q Why don't you ask for a name?

A Well, I may ask, "What was the person's name?" If they say "Sarah," that's fine. That's all I need to know is that it was Sarah.

Q Do you ever ask for the last name?

A No. Do you ever ask for the person's address?

A No.

Q Why not?

A I'm not there to investigate their offenses.

Q Has anyone ever told you the full name of the person who they –

A I can't recall for – other than what they were there for or charged with?

Q Yes.

A Not that I can recall. I will usually – well, I do stop them when they get into certain areas that I don't need that information in order for treatment purposes. If they want to tell me it was Sarah so-and-so, I will stop them and say, "I don't need that information," and they understand the limits of confidentiality, that if they give up so much information, then, you know, [192] I may have to take that – well, I definitely will take it to their facilitator/therapist/counselor and then take that to the treatment team, to see if that's reportable or not.

Q What do you mean by "reportable"?

A If it needed to be reported further in some other area.

Q Such as, what, a child abuse situation?

A Yeah. I'm not – that's not my profession, so I turn it over to the treatment team and let them decide whether it would fall under a certain category.

Q Let me make sure I understand your testimony. Have you ever had an inmate tell you the full name of a

person whom they sexually assaulted which was not the victim for whom they'd been convicted?

A Not that I can recall.

Q Do you ever ask –

A I have had participants give me names that they have told me are not real names of other – of victims that they've offended against.

Q What about child molestation? Do you ever ask an inmate whether they have molested a [193] child? And this is during the polygraph exam.

A Yes.

Q And has anyone ever reported to you that they had?

A Yes.

Q And has anyone ever told you that they had molested someone different than the person that they were convicted of molesting?

A Yes.

Q And did you ask for the victim's name?

A Not – as I explained before, an identifier to that person so that we could keep them separate. If I have Sarah who is 12 and Jill who is 10 and Billy who is 8, I need to have an identifier to identify those people whether they're their real names or not, I do not know. I've had several people disclose that way.

Q Has anyone ever disclosed to you the real name of the – of an additional victim?

A Not that I can recall.

Q Have you ever taken the information about child molestation and reported it to the SRS?

* * *

[199] the polygraph tests are discussed in group therapy, correct?

A Yes.

Q And there's certainly nothing keeping the inmates – requiring the inmates to keep that information confidential, correct?

A No. Well, not correct. They sign a commitment packet that they must keep the information that's heard up there and shared up there confidential. Now, whether that's done or not, I'm not aware. I'm not sure whether it is or not.

Q Why don't you use a videotape?

MR. DOWELL: Object to the form of the –

Q (By Mr. Rebein) Sorry. In the plethysmograph examination.

A I – for what purpose?

Q To use that to see if the inmates get aroused from watching the videotape.

A Oh, okay. Are you saying videotape stiumlus –

Q Yes.

A – or videotape them taking the assessment?

Q Let me – stimulus.

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT GENE LILE, Plaintiff, -vs- DAVID R. McKUNE, et al., Defendants.	)	Case No. 95-3266-DES

THE DEPOSITION OF KATHRYN PHOENIX, produced, sworn and examined on behalf of the Plaintiff, pursuant to Agreement, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Monday, September 30, 1996, at the Lansing Correctional Facility, in the City of Lansing, in the County of Leavenworth and State of Kansas, before me:

CHARLES W. MOTTER, RDR, CRR
of
MOTTER COURT REPORTING

a Certified Shorthand Reporter, in a certain cause now pending in the United States District Court for the District of Kansas, wherein ROBERT GENE LILE is Plaintiff and DAVID R. McKUNE, et al. are Defendants.

* * *

[19] needed, and I'll go by what's in the master file. And then I work with the client to have them feel comfortable

enough to let me know about their life and then look at that picture. It's like placing a lot of pieces to a puzzle together.

Q Would one of those components be a sexual history?

A Correct.

Q And you have – everyone's required to fill out a sexual history from the first time they kiss a girl to their first actual sexual intercourse experience to all other forms of –

A Correct.

Q – sexual interaction, deviant and normal, right?

A Correct.

Q And what's the purpose of having them fill out the sexual history?

A It's used for clinical purposes for therapy, to look at their developmental issues. Also, another component to use is their autobiography. It's just not one thing that basically creates a sex offender, it's an

* * *

[35] court documents or something from his conviction?

A Right. Any other prior convictions are in the master file.

Q What about charges but no convictions? Are you aware –

A Charges, right, are in the master file. Any information pertaining to sex offending behavior.

Q Okay. Now, the question that I asked you was: What's your strategy to get them to be candid and forthcoming and talk about these other sexual offenses?

A Okay. Since we work in group, there is a lot of education that takes place. We use Freeman-Longo material, the books – it's written in Freeman-Longo's workbooks that – in reference to this being a buildup and prior offenses. Films also address this issue.

Q Do you use group therapy?

A Right. Correct. Group therapy, having other individuals talk about their sexual history, their autobiography. Again, allowing this person to feel safe that they're about to [36] disclose that they've had this particular behavior over time.

Q Uh-huh. What do you do if you get a sense of – if an inmate is, for lack of a better way to put it, sandbagging or not being completely forthright about some of his past sexual offenses, and you have an idea, from whatever source, that you believe he may have past sexual offenses? Do you say, "Listen, Joe, I think that there's some other past offenses that you need to come forward with or at least be candid about to fully understand your misconduct"?

A What I would generally work at is saying, "Okay. There is – all of this information is provided. What do you think about that? What do you think how – how that applies to your life?" And just going back with whatever the responses are. Then, "Well, I understand from what you're saying in your sexual history in regards to this area, maybe you need to look at that a little bit more

closely. What do you" – and then if there's a particular date or a particular charge or even a prior conviction, would work at,

* * *

[46] think these type – this inmate should these questions under the polygraph"?

A Or "Ask those – these particular questions." Now, it's –

Q To get – is that to help him come to terms with his sexual deviancy, if he's denying it?

A His offense behavior?

Q Uh-huh.

A Correct.

Q What if the polygraph doesn't show that he – he's answered all of his questions correctly, for example? I don't – would you ask an inmate, "Did the victim suffer pain and suffering for the offense for which you were convicted?" Would that be one of the type of questions?

A No.

Q Could you give me an example?

A Of a question that might –

Q Yes.

A "Did you" – I don't say the – Mike Parsons gives the polygraph and I – again, not fully understanding how he goes about that process, because sometimes I've given him a sentence [47] and he says, "Well, I need to reform that sentence."

Q Sure.

A He's the technician. He knows that stuff.

Q Uh-huh.

A But the group might have a question that they want a particular inmate to find an answer to, a real general statement like, "Did you hit your victim and push your victim down prior to your sexually assaulting them?" So that's how the group might – would formulate a question.

Q Okay. If the inmate takes the polygraph and answers the question and it doesn't show that he's not telling the truth, that he – or that he is telling the truth for whatever the question is, what do you do with that?

A Again, that's – we talk about that in group and allow the participant to talk about how – what they think about the process, how they felt about it, how it would apply in their cycle. Just going with where – where they are with their deviant cycle.

Q Would you allow an inmate to take a polygraph if he wanted to ascertain and show to you

* * *

[50] what is your duty or obligation, if any at all, to let someone know that these other children have been molested? That's a hypothetical.

A Mandatory reporting –

Q That's your obligation?

A No. It's a part of – because I'm a licensed social worker, I'd have to have concrete information in order to

report it. I need a date and a time, basically questions of who, what, why, when, and where. I need all of that in order to report.

Q Uh-huh.

A If an individual discusses their offending behavior and they generalize and state, "Well, I have 25 other victims." "Okay. You have 25 other victims. So there's offending behavior. Let's take a look at that."

Within the assessment and evaluation phase and all of the education in regards to offending behavior, the participants are informed that there's mandatory reporting if we have all the who, what, whys, when and wheres.

[1-B]

LUKE REED, Petitioner, -vs- DAVID McKUNE, Respondent.	)	Case No. 9606 HC 00071

PARTIAL TRANSCRIPT

Proceedings of Hearing on Petition for Writ of Habeas Corpus had before the HONORABLE MARTIN ASHER, DISTRICT JUDGE, at Leavenworth, Kansas, on November 4, 1996.

* * *

[27] voluntarily. And the inmate puts on there that he's doing it because he doesn't want to lose his housing or he's doing it under duress. Are you familiar with that situation?

A. Okay.

Q. What does the department do to that inmate?

A. It's consider [sic] the same as a refusal.

Q. Even it it's a true statement?

A. I can't judge whether it being a true statement or not.

Q. Is there not a disciplinary regulation that is punishable by the very disciplinary penalties? Segregation.

Restriction. Loss of good time, et cetera, for an inmate laying to any staff or contract employee?

A. There's a rule infraction for lying; yes. And it is punishable by some of the things you said there; yes.

Q. So an inmate is under a duty not to lie to anybody that works for, or the contractee of Department of Corrections. Is that correct?

A. They're supposed to not do that; right.

Q. Okay. So if they get up to S.A.T.P. and S.A.T.P. says are you here voluntarily, and they put no. I'm here because I'm afraid I'll lost my housing and I'll get made unassigned for cause, you penalize him for that. Is that correct?

A. We penalize them because the program cannot take them [28] into the program that they say that they're there because they're being forced there and they have no desire to learn. While they're there.

Q. The second part of that, where there's no desire to learn. What if that's not a factor. It's just that they want on the record the truth. That they are there solely because the Department has it's course of mechanism to force them up there. They still get punished; correct?

A. They receive sanctions; yes.

Q. And those are the same sanctions as if the inmate had never, absolutely refused to even go to the program at all.

A. Yes.

Q. So the Department doesn't consider this a voluntary program but the S.A.T.P. people do. Is that correct?

A. I can't speak for them.

Q. Okay. Does the Department consider this a voluntary program?

A. (No audible response.)

Q. Let me help you. Voluntary in a sense that it's done at his own free will. It's done at the inmate's own free will.

A. The Department believes that if a person is assessed that program through the classification process, that

* * *

Citation Rank (R) Database Mode
XXVIII Kan. Op. R 1 OF 1 KS-AG Page
Atty. Gen.
XXVIII Kan. Op. Atty. Gen. 25, Kan. Atty. Gen. Op. No. 94-67, 1994 WL 240550 (Kan.A.G.)

Office of the Attorney General
State of Kansas

Opinion No. **94-67**
May 17, 1994

Re: Minors – Kansas Code for Care of Children; Matters Prior to Filing Petition – Reporting of Certain Abuse or Neglect of Children; Persons Reporting

Public Health – Confidential Communications and Information; Treatment Facility Patients – Privilege of Patient of Treatment Facility to Prevent Disclosure of Treatment and of Confidential Communications; Exceptions to Privilege

Synopsis: Licensed psychologists (who direct registered masters level psychologist) and licensed social workers employed at a treatment facility are required to report incidents of suspected child abuse or neglect which are disclosed during an examination or interview. This requirement is applicable to communications made by a criminal defendant during the course of a court-ordered mental evaluation as well as to other communications made by a patient of a treatment facility. Because of a specific statutory exception, the reporting of such incidents is not considered a breech of the patient's privilege to prevent disclosure of confidential communications. Cited herein: K.S.A. 21-2606; K.S.A.1993 Supp. 21-3504; 21-3505; 38-1522; 65-5601; 65-5602.

Honorable Tim Shallenburger
State Representative, 1st District
2027 Fairview
Baxter Springs, Kansas 66713

Dear Representative Shallenburger:

As representative for the first district, you request our opinion regarding the interplay of K.S.A. 38-1522, the "duty to report child abuse and neglect" statute, and the privilege of nondisclosure of confidential communications within a particular factual situation.

You present the following scenario: After entering pleas of guilty to one count of criminal sodomy (K.S.A.1993 Supp. 21-3505) and two counts of aggravated indecent liberties with a child (K.S.A.1993 Supp. 21-3504), the court ordered a presentence report. As a part of the presentence report the court ordered a mental examination of the defendant pursuant to K.S.A. 21-2606(a). The mental examination was conducted at a community mental health center by a registered masters level psychologist practicing under the direction of a licensed psychologist. During the course of the evaluation the defendant disclosed in excess of forty additional victims who were not the subjects of the original charges.

In light of this situation, you pose the following questions:

> "1. When admission to illegal sexual acts are disclosed during the course of an evaluation for suitability for outpatient sexual offender treatment or during a court ordered presentence evaluation, is the examiner obligated by law to report those incidents to the proper authority?

"2. If not legally obligated to report such incidents, would it be considered a breech of confidentiality if a report is made? Is there a difference if a court orders an evaluation? Is there a difference whether a social worker or masters level psychologist performs the evaluation?"

The court-ordered mental examination in issue was conducted at a community mental health center which is a treatment facility pursuant to the confidential communications and information act, K.S.A. 65-5601 et seq. A person who is examined or interviewed at a treatment facility has a privilege to prevent treatment personnel from disclosing any confidential communications made for the purposes of diagnosis or treatment of the patient's mental, alcoholic, drug dependency or emotional condition. K.S.A. 65-5602. Any employee of a treatment facility is considered to be treatment personnel. K.S.A. 65-5601(b) and (c). However, this privilege of nondisclusure [sic] of confidential communications is not absolute. K.S.A. 65-5603(a) lists thirteen exceptions to this privilege, one of which is pertinent to this opinion. Specifically, the privilege to prevent disclosure does not extend to:

"any communication which forms the substance of information which the treatment personnel or the patient is required by law to report to a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed;" K.S.A. 65-5203(a) (4).

This exception clearly permits disclosure of otherwise confidential communications if such is information which treatment personnel are required to report. K.S.A.

38-1522 requires specified persons to promptly report any suspicision "that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse." (Depending upon the circumstances the report is required to be made to the state department of social and rehabilitation services, the appropriate law enforcement agency or the attorney general.) While licensed psychologists and licensed social workers are among the persons specified by K.S.A. 38-1522 as falling within this mandatory reporting obligation, registered masters level psychologists are not listed. However, in the situation presented the registered masters level psychologist worked under the direction of a licensed psychologist who is required to report suspected abuse and neglect of children.

In conclusion, a licensed psychologist (who directs the practice of a registered masters level psychologist) or a licensed social worker employed at a treatment facility is required to report incidents of child abuse or neglect which are disclosed during an examination or interview. This requirement is applicable to communications made by a criminal defendant during the course of a court-ordered mental examination conducted at a treatment facility as well as to other communications made by a patient of a treatment facility. Because of a specific statutory exception, the reporting of such incidents is not considered a breech of the patient's privilege of confidentiality.

Please be advised that the foregoing conclusion is premised on the specific facts presented. While a different set of facts might result in a similar conclusion, we

have analyzed only the statutes applicable to the situation presented.

Very truly yours,

Robert T. Stephan
Attorney General of Kansas

Camille Nohe
Assistant Attorney General
1994 WL 240550 (Kan.A.G.),
XXVIII Kan. Op. Atty. Gen. 25,
Kan. Atty. Gen. Op. No. 94-67,
1994 WL 240550 (Kan.A.G.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT G. LILE, Plaintiff,	)	
v.	)	CASE NO.
DAVID R. McKUNE, et al.,	)	95-3266-DES
Defendants.	)	

ORDER

(Filed Apr. 23, 1996)

This matter is before the court on plaintiff's motion for a temporary injunction (Doc. 77). Plaintiff, an inmate confined in Lansing Correctional Facility in Lansing, Kansas, proceeds with appointed counsel on a civil rights complaint filed pursuant to 42 U.S.C. § 1983, in which he alleges constitutional error in his required participation in the Sexual Abuse Treatment Program (SATP) at the facility. Having considered the record and the testimony presented at the hearing on plaintiff's motion, the court enters the following findings and order.

Plaintiff is serving a life sentence for 1983 convictions for the aggravated kidnapping, rape, and aggravated sodomy of a high school student. In a separate action,[1] plaintiff seeks a federal writ of habeas corpus based upon alleged constitutional error in those convictions.

---

[1] *Lile v. State of Kansas*, No. 95-3032-DES.

In January 1990, plaintiff entered into a recommended Inmate Program Agreement that did not include SATP programming. After completing his program agreement in July 1994, plaintiff's Unit Team Counselor recommended the agreement be amended to include SATP programming. Plaintiff refused to accept this amendment.

In January 1995, defendant Secretary of Corrections Simmons issued a Policy Memorandum declaring null and void all program agreements of inmates with controlling offenses prior to July 1, 1988. New program plans were to be offered that included notice that "refusal to participate in or successfully complete recommended programs shall result in the withholding of good time credits."[2] Believing the decision whether to accept the new program agreement was no longer "voluntary," plaintiff accepted an agreement which included SATP programming. Further, by interdepartmental memorandum in March 1995, defendant Simmons indicated that inmates refusing to participate in recommended programs would be ineligible for medium security housing, and would be transferred to the maximum security cellhouse.[3]

The SATP programming requires, in part, that an inmate admit guilt in the sexual offense(s) of which he was convicted, and that an inmate participate in polygraph and plethysmography testing. Defendants acknowledge that under the current Offender Privileges

[2] Exhibit G in the Martinez report submitted with defendants' answer (Doc. 74) to the original complaint.

[3] Exhibit H in the Martinez report submitted with defendants' answer (Doc. 74) to the original complaint.

and Incentives policy,[4] if plaintiff refuses the recommended SATP programming, he shall lose all rights and privileges attendant to his current medium security (Level III) custody, and he will be immediately dropped to maximum security (Level I) with significant restrictions on his privileges.

In his complaint, plaintiff seeks a declaratory judgment that the required SATP programming violates his rights under the First and Fifth Amendments, as well as his constitutional right to privacy and to due process. Plaintiff also seeks injunctive relief to prevent defendants from coercing or forcing him to participate in the SATP programming. Plaintiff's motion for temporary injunctive relief focuses on preventing defendants from transferring plaintiff to maximum security with loss of privileges, based upon plaintiff's assertion of his constitutional rights.

Defendants indicated in the hearing on plaintiff's motion that plaintiff is currently still on the waiting list for SATP.

A final pretrial hearing is set in this case in less than four months, and dispositive motions are to be filed on or before September 6, 1996.

[4] Internal Management Policy and Procedure (IMPP)11-101, effective January 1, 1996. Exhibit N in the Martinez report submitted with defendants' answer (Doc. 74) to the original complaint.

Standards

To obtain injunctive relief, the moving party must establish:

> (1) the movant will suffer irreparable injury unless the injunction issues;
>
> (2) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party;
>
> (3) the injunction, if issued, would not be adverse to the public interest; and
>
> (4) substantial likelihood that the movant will succeed on the merits.

Walmer v. United States Department of Defense, 52 F.3d 851, 854 (10th Cir.), *cert. denied*, 116 S.Ct. 474 (1995). If the first three standards are met, the likelihood of success requirement is satisfied if the moving party shows there are serious, substantial, and difficult questions regarding the merits of the moving party's claim that make the issue ripe for litigation and deserving of more deliberate investigation. *Id.*

Also, "when due process contentions are raised relative to the operation, maintenance and administration of the penal system, the courts should be acutely aware that caution must be exercised in achieving a careful balance of the interest of that system as against the interests of the prisoners." *Marchesani v. McCune*, 531 F.2d 459, 461 (10th Cir.) (citations omitted), *cert. denied*, 429 U.S. 846 (1976).

Discussion

Having reviewed the record and the testimony in the hearing on plaintiff's motion, the court is persuaded that the standards for obtaining preliminary injunctive relief are satisfied in this case.

First, constitutional rights are at issue. Plaintiff claims significant violations of his constitutional rights will result if he is required to participate in the SATP programming as it is conducted at the Lansing facility, or if he is forced to suffer harsh and punitive measures for asserting his constitutional rights. The punitive measures for refusing recommended programming pose an imminent and distinct threat to plaintiff. Plaintiff seeks protection from this court only to preserve the status quo of remaining on the waiting list for SATP programming until the merits of his constitutional claims have been decided. Defendants' pleadings and testimony make clear that absent such protection, plaintiff's assertion of his constitutional rights will result in irreparable injury that cannot be undone through monetary relief. Defendants cite their broad deference in prison management, as well as the due process limitations recognized in *Sandin v. Conner*, 115 S.Ct. 2293 (1995), regarding segregated confinement, and claim, thereby, that plaintiff's transfer to Level I does not constitute irreparable injury. This claim sidesteps the obvious reason for the transfer in the first place, that the transfer directly results from plaintiff's assertion of his constitutional rights.

Second, the threatened injury to plaintiff's constitutional rights outweighs defendants' interest in requiring plaintiff to participate in SATP prior to the resolution of

plaintiff's constitutional challenge to this programming. Plaintiff is currently on a waiting list for SATP programming, and until forced to participate in such programming, he is not subject to the complained of "punishment" attendant to the offender management policy for refusing such programming. No dismantling of either SATP or the Offender Privileges and Incentive policy is required to continue the status quo and allow plaintiff to remain on the waiting list for this particular programming. Plaintiff indicates he is willing to participate in the program if the operation and methodology of the program passes constitutional muster. Defendants cite no harm in delaying plaintiff's programming other than a broad and speculative claim that it will invite a floodgate of inmate litigation.

Third, the public interest is served by an offender program that passes constitutional muster. Although defendants argue it would not be in the public interest to dismantle the Offender Incentives and Privileges policy, the court finds this argument overstates the effect of the requested preliminary injunctive relief. The relief sought flows to a single inmate who is currently on a waiting list for the complained of programming, who proceeds with appointed counsel on significant issues, and whose litigation is proceeding in an orderly and timely manner towards resolution. *See Sisneros v. Nix*, 884 F.Supp. 1313, 1348 (S.D.Iowa 1995) (rectifying wrongful transfer is not untoward interference in prison operation; defendants required only to honor constitutional obligations); *St. Claire v. Cuyler*, 482 F.Supp. 257, 260 (E.D.Pa. 1979) (public interest requires constitutional administration of prison).

Fourth, the court finds plaintiff's challenges to the constitutionality of the SATP programming at LCF raise issues that are sufficiently serious and substantial as to make them fair grounds for litigation. For example, plaintiff's Fifth Amendment claim has some support in federal and state courts. *See United States v. Ross*, 9 F.3d 1182, 1195-97 (7th Cir. 1993) (concurring opinion), *cert. granted and judgment vacated on other grounds*, 114 S.Ct. 2129 (1994). *See also Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991) (where inmate convicted by jury while denying guilt, trial court erred in requiring defendant to support therapy with admission of guilt to avoid revocation of probation).

In sum, the court concludes a preliminary injunction would preserve the status quo, avoid potential irreparable injury to plaintiff's constitutional rights, and not be adverse to public interests. The court further finds plaintiff's constitutional claims raise questions sufficiently serious, substantial and difficult as to make them ripe for litigation.

IT IS THEREFORE ORDERED that plaintiff's motion for a temporary injunction (Doc. 77) is granted. Plaintiff is to continue on the waiting list for SATP programming at Lansing Correctional Facility, and defendants are enjoined from coercing in any manner plaintiff's acceptance of or participation in SATP programming, until the merits of plaintiff's claims have been decided.

DATED: This 23 day of April, 1996 at Topeka, Kansas.

/s/ DALE E. SAFFELS
DALE E. SAFFELS
United States District Judge

33

JUL 12 2001

No. 00-1187

Supreme Court, U.S.
FILED
JUL 12 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

David R. McKune, Warden,
Charles Simmons, Secretary,
Kansas Department of Corrections

Petitioner,

v.

Robert G. Lile,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

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52 pp

QUESTION PRESENTED

Whether the revocation of correctional institution privileges violates the Fifth Amendment's privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate's failure to accept responsibility for his crimes as part of a sex offender treatment program?

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OPINIONS BELOW

The September 5, 2000, decision of the United States Court of Appeals for the Tenth Circuit affirming the District Court is reported at 224 F.3d 1175, and is included in the petition appendix. The decision of the District Court granting summary judgment to respondent is reported at 24 F. Supp. 2d 1152, and is also included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision in this case on September 5, 2000, and denied the State's timely petition for rehearing and suggestion for rehearing en banc on October 24, 2000. The State filed a timely petition for a writ of *certiorari* on January 22, 2001, and this Court granted review on May 14, 2001.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part that

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

STATEMENT OF THE CASE

1. *Nature of the Suit.* The Kansas Department of Corrections employs a comprehensive system of earnable inmate privileges in order to manage the offender population and reinforce constructive behavioral changes. As part of this system, inmates work their way through privilege incentive levels in accordance with their behavior, at all times subject to reduction for disciplinary, work or recommended program infractions.

Inmate Lile, a convicted, violent sex offender, filed this suit after his prison privileges were to be reduced to Level I (from Level III) for his refusal to participate in recommended

treatment, the Sexual Abuse Treatment Program (SATP). Inmate Lile objected to the SATP's requirement that he accept responsibility for his sex crimes. He claims that the change in his prison privileges for refusing to accept responsibility in the SATP would violate his Fifth Amendment privilege against self-incrimination.

2. *Background.*

A. *Facts of Conviction.* Robert G. Lile was convicted in 1983 of the rape, aggravated sodomy, and aggravated kidnapping of a female high school student. *See State v. Lile*, 237 Kan. 210, 699 P.2d 456, 457 (Kan. 1985); *Lile v. McKune*, 45 F. Supp. 2d 1157, 1159-60 (D. Kan. 1999).

At Lile's trial, the victim testified that she had never met Lile prior to the day of the crimes. She testified that the day of the events she was on her way home from school when she saw a car stopped beside the road with the hood up. Lile, who was standing by the car, flagged her down and asked for help. He asked her to pump the brakes of the car while he was looking under the hood. He then came to the driver's door and told the victim to slide over. He pulled a gun, which turned out to be a starter's pistol, from his belt, pointed it at the victim, and ordered her to lock the passenger door. Lile then forced the victim to perform oral sex. After a few minutes, he drove her to a field where he ordered her to remove her clothes. Lile then raped her. *See Lile,* 699 P.2d at 457.

After getting away from Lile, the victim immediately returned to her school, visibly upset, and reported the incident. When Lile was arrested, the police found him in possession of the starter pistol. Although Lile argued that he had met the girl a few days before these events, and that their sexual encounters were consensual, both the Kansas Supreme Court and a federal district court easily concluded that the evidence supported Lile's convictions beyond a reasonable doubt. *See Lile*, 699 P.2d at 458 ("We have no hesitancy in holding that,

considering the entire evidentiary record in the light most favorable to the prosecution, there was sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt of rape and aggravated sodomy"); *Lile*, 45 F. Supp. 2d at 1161 ("The court finds the evidence, when viewed in the light most favorable to the prosecution, clearly is sufficient for a reasonably jury to find beyond a reasonable doubt that petitioner was guilty of the charged offenses").

In 1983, Lile also was convicted of attempted aggravated escape from custody, after he tried to escape from Lansing. *See Lile v. Simmons*, 929 P.2d 171, 172 (Kan. Ct. App. 1996).

B. *The Kansas Internal Management Policy And Procedure System.* In 1996, the Kansas prisons adopted an Internal Management Policy and Procedure system ("IMPP"). Joint Appendix ("J.A.") 47. The Kansas IMPP is designed to "implement a comprehensive system of earnable offender privileges which will provide an effective means of managing the offender population and reinforcing constructive behavioral changes in offenders." J.A. 13.

The IMPP identifies "earnable privileges"—such as television ownership, use of funds, and visitation—and the "Incentive Levels" to which those privileges are attached. *Id.* at 14-19. The Incentive Levels begin with "Intake Level," when an inmate first enters prison, and progress through Levels I, II, and III in prison, and then to Levels IV and V for post-incarceration supervision. *Id.*; *see also id.* at 51-56. The IMPP also provides for "Reductions in Level" due to various inmate infractions or misbehavior. Among the bases for a reduction in Incentive Level are "[r]efusal to participate in recommended programs . . . ." *Id.* at 19; *see also id.* at 57-58. A fold out chart of the Incentive Levels and the corresponding earnable privileges is located at page 27 of the Joint Appendix.

C. *The Kansas Sexual Abuse Treatment Program.* Prison-based treatment for convicted sex offenders in Kansas

prisons began in 1988. The current program is referred to as the Sexual Abuse Treatment Program ("SATP"). The SATP is an 18-month long program that involves substantial counseling on a daily basis. J.A. 107. Admission to the program is voluntary, and frequently participation in the SATP is recommended for sex offenders by prison officials.

As part of the SATP, inmates are expected to complete and sign an "Admission of Responsibility" form. J.A. 31, 107.[1] Participating inmates also are required to complete a sexual history form, *id.* at 32-34, which requires them to detail all of their past offenses.

Participating inmates are informed about the limits of confidentiality in the program. In particular, they are informed that confidentiality may be compromised in six specific circumstances:

1) Mandatory reporting of child abuse.
2) Court ordered release of records.
3) Information needed to protect a third party.
4) Information needed to protect participants from harming themselves or others.
5) Escape planning.
6) Inappropriate relations with staff.

J.A. 35. Although inmates are thus assured of a significant level of confidentiality, there is no legal immunity for any statements made during participation in the SATP. To the best of Kansas's knowledge, however, *no* inmate has ever been charged or prosecuted for any offense as a result of

[1] At the program's inception, the form was titled "Admission of Guilt," J.A. 30, but the form was changed to its current "Admission of Responsibility" format in 1996. *Id.* at 123-26.

participation in prison sex offender treatment during the approximately twelve years such programs have been in existence in Kansas prisons.

The SATP also uses a "Termination Prior To Completion" form that advises an inmate of the consequences of withdrawing from the SATP once begun. J.A. 37. This form requires the inmate's signature and that of a witness, to ensure that inmates fully appreciate the consequences of such a decision. *Id.*

D. *Housing And Custody Classifications/The Lansing Prison.* An inmate's housing assignment is not an earnable privilege under the IMPP. J.A. 54. Instead, housing assignments are a function of an inmate's custody classification and other factors, such as the need for access to medical facilities, the location of assigned programs, and so forth. *Id.* at 59. In the Lansing prison, where inmate Lile resides, there are maximum, medium, and minimum security sections of the prison.[2] *Id.* at 59-60. But, because housing assignments are based on a variety of factors, there are medium security inmates in the maximum security area, and minimum security inmates in the medium security area. *Id.* at 60, 62-63. There simply is no strict segregation of inmates in the medium and maximum security areas based on custody classification. Nor are privileges (i.e., Incentive Levels, such as I, II, or III) inherently tied to custody classification. Thus, inmates with a maximum security custody classification may have Level III privileges, such as personal televisions.

Violations of the IMPP rules may result in an inmate being moved from one area to another, but do not automatically

[2] The maximum and medium security units are "contiguous." J.A. 60. The minimum security unit, which houses only minimum security inmates, is on the same grounds but is physically separate from the remainder of the facility. *Id.* at 61.

change the inmate's custody classification. Thus, a medium security inmate who refused, for example, to participate in a recommended treatment program, might be moved to the maximum security area, but to a *medium* security cell within that area. J.A. 65-66.

Furthermore, the Lansing warden, David R. McKune, when asked in his deposition whether the maximum security area is more dangerous than the medium security area, responded that:

> I'm not sure there's enough differences between the two to say one is more dangerous than the other. I mean, they both have long-term, they both have violent offenders, they both have all kinds of nooks and crannies and hiding spots, and I have assaults in both of them.

J.A. 76. Similarly, when asked whether there are more murderers or dangerous offenders in maximum security, he explained that such generalizations are difficult to make, "because custody isn't just a function of your crime, it's also a function of all of the other points and some of that just is a matter of how you're adjusting, what you're doing, how much time you've got served, all those things. I mean, I have murder 1's living out in the minimum unit." *Id.* at 77. Indeed, Warden McKune repeatedly stated that the maximum security area is *not* inherently more dangerous than the medium security area. *Id.* at 76-81.

E. *Inmate Lile.* Based upon the offenses of which he was convicted, prison officials eventually recommended that inmate Lile participate in the SATP. He refused, because of the acceptance of responsibility requirement, and filed this suit, obtaining injunctive relief. Otherwise, the consequences of inmate Lile's refusal to participate would have been (under the IMPP) a reduction from Level III status to Level I, with a corresponding reduction in privileges. He also would have

been moved to a cell in the maximum security area of the prison.

3. *The District Court Proceedings.* The District Court initially granted a temporary injunction to inmate Lile, J.A. 172-79, precluding the KDOC from reducing his privilege incentive level and keeping him on the SATP waiting list. The District Court ultimately granted summary judgment to inmate Lile on his Fifth Amendment claim. Petition Appendix ("Pet. App.") 33a-54a. The District Court further ordered the injunction continued until appellate review is completed. *Id.* at 55a.

4. *The Tenth Circuit's Decision.* The Tenth Circuit affirmed the District Court. Pet. App. 3a-32a. The Tenth Circuit began its Fifth Amendment analysis by briefly addressing the incrimination component of the privilege. *Id.* at 6a-7a. The Tenth Circuit found the incrimination element of the Fifth Amendment privilege satisfied here for two reasons. First, the written sexual history form might require persons such as inmate Lile to reveal uncharged sexual offenses. *Id.* at 6a-7a. Second, completion of the Acceptance of Responsibility form could subject inmates such as Lile to perjury charges for having maintained their innocence at trial. *Id.* at 7a.

The Tenth Circuit then addressed the "compulsion" element of the privilege. The court began with an examination of the adverse consequences to an inmate for refusing to accept responsibility or to provide a written sexual history. Observing that inmate Lile faced transfer to maximum security (from medium security) if he failed to comply with the SATP requirements, the court noted that such a "transfer would restrict [inmate Lile's] privileges." Pet. App. 10a.

> Specifically, he [inmate Lile] would lose his personal TV; he would have limited access to prison organizations and activities and would be unable to participate in the IMPP;

> he would have limited access to the gym and yard area; there would be a substantial reduction in the amount of money he could spend in the canteen per pay period, from $140 per payroll . . . to $20 per payroll . . .; he would receive a reduction in pay and intake property; and he would have substantially restricted visitation privileges.

Id.

The Tenth Circuit, however, correctly recognized that Lile would not be denied parole nor lose any good time credits (or the opportunity to earn such credits) because he refused to participate in the SATP. Pet. App. 10a-13a. In other words, his *sentence* would be unchanged. The Tenth Circuit thus concluded that the only adverse consequences inmate Lile would suffer for refusing to participate in the SATP would be "transfer to maximum security prison and the resulting loss of privileges." *Id.* at 13a. According to the court, "[t]he critical question, then, is whether the State's imposition of these consequences in response to [inmate Lile's] invocation of his Fifth Amendment right against self-incrimination constitutes impermissible coercion." *Id.*

In resolving the compulsion issue, the Tenth Circuit opined that "[t]here is no single test or factor that is dispositive, so we begin by examining Defendants' arguments." Pet. App. 13a. The court first addressed the argument that there is no compulsion here because inmate Lile's loss of privileges implicates no protected liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995). Although recognizing that changes in an inmate's prison classification ordinarily do not deprive him of a liberty interest, the Tenth Circuit opined that "nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur." Pet. App. 14a. Rather, the court held that "[c]ompulsion can be established by hardships that may not be atypical and that do

not constitute enforceable liberty interests." *Id.* at 15a; *see also id.* at 17a ("It is clear that the compulsion element of a Fifth Amendment claim can be established by penalties which do not constitute a deprivation of protected liberty interests under the Due Process Clause").

The Tenth Circuit then asserted that the "next critical question is whether the consequences imposed constitute penalties that are sufficiently potent and substantial to implicate the Fifth Amendment." Pet. App. 17a-18a. Reviewing again the changes in privileges that would accompany a move from medium to maximum security (including loss of a personal TV), the Tenth Circuit concluded that "these deprivations and changes in environment are penalties sufficient to implicate the Fifth Amendment because they have substantial or potent effects on the inmate." *Id.* at 18a-19a. In reaching that conclusion, the court emphasized that a critical factor is that refusal to participate in the SATP, "standing alone," results in the loss of privileges. *Id.* at 20a.

The Tenth Circuit next considered the argument that there is no compulsion because participation in the SATP is voluntary. The court opined that the fact that the change in privileges in this case automatically followed refusal to participate in the SATP undermined the argument that participation "is truly voluntary." Pet. App. 20a. In supporting that conclusion, the Tenth Circuit distinguished *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (inmate invoked privilege in clemency proceeding), and *Minnesota v. Murphy*, 465 U.S. 420 (1984) (person on probation claimed privilege)—both of which found no Fifth Amendment violation or compulsion—as cases in which the person was not "punished or penalized solely for choosing to remain silent." Pet. App. 23a.

The Tenth Circuit then turned to "[t]wo additional considerations" that it asserted might be helpful in determining what constitutes compulsion. Pet. App. 23a. "The first is a

distinction between a privilege and a penalty." *Id.* Opining that such a distinction may have constitutional significance in this context, the Tenth Circuit without analysis concluded that inmate Lile's loss of privileges in this case is "properly characterized as imposing penalties." *Id.* at 25a.

The Tenth Circuit also considered "the automaticity of the penalty." Pet. App. 25a. Again, the court opined that Supreme Court decisions finding no compulsion in the context of probation, parole or clemency, all involved situations in which adverse consequences for remaining silent were not "automatic." *Id.* at 25a-26a. Thus, the court concluded that "the State has violated [inmate Lile's] Fifth Amendment right against self-incrimination." *Id.* at 27a.

Finally, *after* finding a constitutional violation, the Tenth Circuit applied the balancing test of *Turner v. Safley*, 482 U.S. 78 (1987), which requires an assessment of "whether the prison policy at issue 'is reasonably related to legitimate penological interests.'" Pet. App. 27a (quoting *Turner*). The Tenth Circuit recognized that the state has a legitimate—even compelling— interest in rehabilitating sex offenders, both for the offenders' own benefit and for the public safety. *Id.* at 28a. The court also recognized that

> [t]here is a rational connection between the policy of having prisoners admit responsibility for their offenses and disclose their sexual history in order to participate in the SATP and the legitimate governmental interest in rehabilitation of sex offenders. In fact, *most mental health experts agree* that a "sex offender must admit his guilt for treatment and rehabilitation to be effective."

Id. at 29a (internal citations omitted) (emphasis added).

Nonetheless, the Tenth Circuit concluded that the balancing of interests favors inmate Lile, because (1) "there is no evidence that [inmate Lile] has any alternative means of exercising his Fifth Amendment right," Pet. App. 30a, (2)

"there is no evidence that accommodation of the right would have any negative effect on guards, other prisoners, or prison resources," *id.*, and (3) the alternative to the policy would be to grant immunity for any statements made by the inmate. *Id.* Opining that the state could still prosecute inmate Lile for other sex crimes—but not using any statements he made in the SATP—the Tenth Circuit concluded that "the *Turner* balancing easily weighs in favor of [inmate Lile]." *Id.* at 32a.

SUMMARY OF THE ARGUMENT

There is no dispute in this case that the Kansas SATP is a legitimate, therapeutic treatment program. No evidence suggests that the Kansas SATP is a subterfuge for gathering incriminating evidence to support prosecution of inmates for previously uncharged sex offenses. Indeed, there is no evidence that any inmate has ever been charged with or prosecuted for offenses discussed or disclosed in the Kansas program.

The Kansas SATP is, however, an important component of Kansas's efforts to rehabilitate convicted sex offenders, both for their own benefit and for the protection of the public. Mental health professionals agree that acceptance of responsibility is a critical component of an effective treatment program. Thus, effective treatment is the primary justification for the Kansas SATP requirement, and that purpose is unrelated to any criminal investigative or prosecutorial purposes.

It is common—and in fact essential—that prison administrators utilize incentives to rehabilitate and manage inmate populations. Changing or withholding prison *privileges* in which an inmate has no constitutionally protected liberty interest, or subjecting an inmate to prison conditions that are not atypical, generally cannot violate the Constitution. *Sandin v. Conner*, 515 U.S. 472 (1995). There is nothing arbitrary or irrational about Kansas prison administrators

giving convicted sex offenders the choice of meaningful participation in a treatment program or the withholding of certain privileges. Thus, the choice presented to inmate Lile in this case does not amount to "compulsion" under the Fifth Amendment.

This Court's recent decisions suggest a bright-line rule for determining what amounts to unconstitutional "compulsion" in the prison context. Where, as here, (1) the inmate's *sentence* has not been increased, (2) he has not been subjected to *atypical* prison conditions, and (3) prison officials have not acted *arbitrarily or irrationally*, the State cannot have crossed that constitutional line. Indeed, this Court has held that neither (1) the threat of a reduced opportunity for clemency, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), (2) the threat of revocation of parole, *Minnesota v. Murphy*, 465 U.S. 420 (1984), nor (3) the threat of adverse inferences being drawn at a prison disciplinary hearing, *Baxter v. Palmigiano*, 425 U.S. 308 (1976), amount to unconstitutional "compulsion."

If there is no unconstitutional "compulsion," then there is no reason the State must immunize all statements that inmates make while participating in the SATP. Nor, absent any Fifth Amendment violation, is there any reason to engage in a balancing of interests under *Turner v. Safley*, 482 U.S. 78 (1987). *Turner* does, however, stand for the fundamental proposition that federal courts must pay considerable deference to state prison regulations, particularly those which serve rehabilitative and safety purposes.

Moreover, the *Turner* balancing analysis here favors upholding the Kansas IMPP approach to an inmate's refusal to accept responsibility in the SATP. The State has a legitimate interest in making sure that inmates engage in meaningful treatment programs. The State also has a legitimate interest in the potential prosecution and punishment of those who have committed unreported sexual offenses, especially those

involving child victims. Although Kansas has yet to charge or prosecute even a single inmate as a result of participation in the SATP, the Constitution should not force the State to choose between completely immunizing the participants in the SATP, or perhaps abandoning the SATP altogether.

ARGUMENT

I. There Is No Unconstitutional Compulsion In This Prison Case

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The [A]mendment speaks of compulsion," *United States v. Monia*, 317 U.S. 424, 427 (1943), and thus "[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher v. United States*, 425 U.S. 391, 397 (1976). Indeed, "[t]he Constitution does not prohibit every element which influences a [person] to make incriminating admissions. * * * The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony." *United States v. Washington*, 431 U.S. 181, 187-88 (1977) (emphasis added).

As a result, the "criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha v. California*, 402 U.S. 183, 213 (1971) (citation omitted).[3]

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[3] For this reason, the Court repeatedly has held that plea bargaining does not violate the Fifth Amendment, even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient

The threshold question, then, is whether inmate Lile has been subjected to unconstitutional "compulsion" intended to force him to waive his Fifth Amendment rights and incriminate himself. That inquiry necessarily must take into account the *context* in which inmate Lile's claim arises: he is a convicted, incarcerated sex offender asserting the privilege in order to avoid having to comply with an indisputably valid, prison treatment program requirement. Importantly, inmate Lile does not come to this Court as either a free citizen nor an innocent man, and that distinguishes his situation from virtually all of the cases on which he may rely in this Court.

There is no suggestion in this case that government officials would subject inmate Lile to physical or mental abuse or other mistreatment in order to force a "confession" from him. Nor is there any suggestion that the acceptance of responsibility requirement of the Kansas SATP is a subterfuge for obtaining incriminating evidence against inmates as part of ongoing criminal investigations or in preparation for possible future prosecutions. Indeed, there is no dispute that acceptance of responsibility is critical to any hope of successful treatment for sex offenders such as Lile. *See, e.g.*, J.A. 107 (uncontroverted testimony of sex offender therapist Barbara Owens that "[a] person with sexual offending behavior needs to take responsibility for that sexual offending behavior and be accountable for those offensive behaviors").

Thus, as demonstrated below, the circumstances presented here simply do not raise "the evils at which [the Fifth Amendment privilege] was to strike." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).

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treatment. *See, e.g., Brady v. United States*, 397 U.S. 742, 751 (1970); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Corbitt v. New Jersey*, 439 U.S. 212, 218-19 (1978).

A. The Touchstone For Unconstitutional Compulsion In The Prison Setting Is The Imposition Of Atypical Hardships

1. *Atypical Hardships And "Compulsion."* In *Sandin v. Conner*, 515 U.S. 472, 484 (1995), this Court held that prison officials could place a prisoner in disciplinary segregation for thirty days without providing procedural due process because such segregation did not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *See also Meachum v. Fano*, 427 U.S. 215, 228 (1976) (noting that absent some state-created right, "prison officials have discretion to transfer [prisoners] for whatever reason or for no reason at all"). In other words, when an inmate has no constitutionally protected liberty interest in a particular housing level, the Constitution generally cannot be violated when that housing level is changed.

Surprisingly, the Tenth Circuit in this case found compulsion in a reduction of privileges to which that court acknowledged inmate Lile had no constitutional or statutory right, and in which he had no protected liberty interest of any kind. *See* Pet. App. 13a-14a ("[A]n inmate's prison classification ordinarily does not deprive him of liberty[] because he is not entitled to a particular degree of liberty in prison") (quoting *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994)). In doing so, the Tenth Circuit opined that "nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur." Pet. App. 14a. Notably, however, the Tenth Circuit could not cite a single case from *any* court (other than the district court below)

finding compulsion in the prison setting absent the imposition of *atypical hardships*.[4]

The Tenth Circuit pointed to this Court's recent decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), as an example of a Fifth Amendment "compulsion" case in the prison setting in which this Court did not apply an "atypical hardship" analysis. However, *Woodard* did not involve a challenge to prison regulations in the prison setting but, rather, a challenge to a clemency procedure that operated outside prison and which had nothing to do with the management of inmates. Moreover, in *Woodard* this Court stated that, "[i]n our opinion, the procedures of the Authority do not *under any view* violate the Fifth Amendment privilege." *Id.* at 286 (emphasis added). Thus, the fact that this Court did not engage in an atypical hardships/liberty interest analysis in *Woodard*—when the claim did not involve prison regulations or a prison setting and this Court found no Fifth Amendment violation *under any view* of that provision—gives no support to the Tenth Circuit's assertion that compulsion may be found in the prison setting absent the imposition of *atypical hardships*.

The Tenth Circuit also pointed to other cases that it opined stand for the proposition that "Supreme Court precedent allows that a prisoner's confinement could violate the constitution even if it did not implicate a liberty interest or violate due process." Pet. App. 14a-15a. But this adds nothing to the analysis here because, as this Court acknowledged in *Sandin*:

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[4] *Cf. McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[P]rison officials may constitutionally deny benefits to a prisoner who, by invoking his privilege against self-incrimination, refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation and not his invocation of his privilege").

> Prisoners . . . , of course, retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available.

515 U.S. at 487 n.11.

Fundamentally, the issue in this case is whether unconstitutional "compulsion" can result from the normal incidents of prison life. There is no dispute here that (1) there has been no increase in inmate Lile's *sentence* and (2) none of the prison conditions which he would experience as a result of his refusal to participate in the SATP would be *atypical hardships*.

Although the Tenth Circuit cited *no* cases actually finding compulsion in the prison setting absent the imposition of *atypical hardships*, it of course had to acknowledge some prison cases that quite naturally linked unconstitutional compulsion to the imposition of such hardships. *See* Pet. App. 16a-17a. Importantly, the Kansas Supreme Court—which is the ultimate arbiter of Kansas law and which is very familiar with the Kansas prison system—previously addressed the atypical hardship issue and expressly rejected the inmate's argument as follows:

> The housing assignment given to an inmate, his or her custody classification, granting of parole, spending limitations at a canteen, regulation of visiting hours, withholding of good time awards, and regulation of other daily activities which are not atypical and do not pose a significant hardship within a prison, do not involve a liberty interest or violate the defendant's Fifth Amendment right by compelling him to incriminate himself and participate in SATP.

Bankes v. Simmons, 963 P.2d 412, 420 (Kan. 1998). The Tenth Circuit unconvincingly attempted to distinguish *Bankes* by opining that "[w]hile we do not necessarily disagree with the Kansas Supreme Court's determination . . . our holding instructs that the liberty analysis should not be part of a Fifth Amendment privilege case." Pet. App. 17a n.9.

To reach its erroneous conclusion in this case, the Tenth Circuit also had to ignore its own precedent. In *Chambers v. Bachicha*, 39 F.3d 1191, 1994 WL 596702 (10th Cir. 1994), that court stated that, "[a]ppellant has no right to earned time. The fact that prison officials refuse to confer a portion of the potential monthly earned time merely constitutes the denial of a privilege, and is thus not a compulsion to testify for purposes of the Fifth Amendment." *Id.* at *3. The Tenth Circuit in this case clearly recognized the implications of *Chambers*, but it avoided the consequences only by relying on the fact that *Chambers* was unpublished: "To the extent that *Chambers* may be interpreted as a rule that compulsion can occur only where one is forced to forgo a constitutional right or a liberty interest, we are not bound to follow it here." Pet. App. 16a n.8.

The Tenth Circuit had no answer to the *reasoning* of *Chambers*. But the Tenth Circuit correctly decided *Chambers*, not *Lile*. Since by definition there is no constitutional right to prison privileges, inmate Lile must meet the burden of proving that he deserves a more favorable security classification or housing assignment, something he has failed to do. *See United States v. Rylander*, 460 U.S. 752, 758 (1983) (noting that allowing silence to suffice as affirmation that one deserves a benefit, "would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his").

2. *The "Penalty" Analysis*. Ultimately, the Tenth Circuit characterized the application of the IMPP regulation here as a *penalty*. Pet. App. 24a. But this was wrong. A long line of cases hold that the Fifth Amendment is not violated when a person's assertion of the privilege prevents him from establishing his entitlement to a government benefit. *See, e.g., Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) ("[T]he Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights'") (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)); *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953) ("No one . . . questions or doubts [petitioner's] right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question 'No.'"). The withholding of prison privileges—to which an inmate has neither a statutory nor constitutional entitlement—does not amount to a "penalty" for constitutional purposes.

The Tenth Circuit also tried to buttress its "*Sandin* analysis" by listing a number of this Court's cases finding compulsion in various penalties, "none of which are explicitly characterized as deprivations of protected liberty interests." Pet. App. 15a-16a. These so-called "penalty cases" are not without their critics: "Nothing in the historical development of the privilege suggests that threatened loss of employment was the kind of compulsion against which the amendment aimed to protect; the 'compulsions' of concern to the framers were torture, bullying and imprisonment for contempt." Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 707 (1968); *see also* Leonard W. Levy, *History and Judicial History: The Case of Fifth Amendment*, in *Constitutional Opinions: Aspects*

of the Bill of Rights 193, 208 (1986) ("Decisions like . . . *Garrity v. New Jersey* (1967) . . . draw no clear support from the past").

The Court should not extend the penalty cases—with their questionable historical basis, *see also* Part I.C. below—to justify a finding of compulsion in this prison setting. Rather, here constitutional "compulsion" should not be found absent the imposition of *atypical hardships* on an inmate. To the best of Kansas's knowledge, the Court has never applied these "penalty" cases to find a Fifth Amendment violation in the prison setting, and it should not do so in this case.

3. *The Constitutional Rule*. The fact that the Tenth Circuit could find compulsion in this case highlights the need for a bright line rule. The Court's previous decisions suggest such a rule: when (1) an inmate's sentence has not been increased, (2) he has not been subjected to atypical prison conditions, and (3) prison officials have not acted arbitrarily or irrationally toward the inmate, there cannot be unconstitutional "compulsion" for Fifth Amendment purposes.

Prison administrators need such clear guidance in order to implement effective, incentive-based systems of rehabilitation. A rule allowing prison administrators to utilize reasonably the naturally occurring incidents of prison life to encourage socially constructive behavior and rehabilitate inmates is consistent with this Court's precedents—and it is plain common sense.

An inmate comes to prison with no right to any particular housing level or security classification. *Meachum v. Fano*, 427 U.S. at 224 ("The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another."); Pet. App. 13a-14a ("'[A]n inmate's prison classification ordinarily does not deprive him of liberty[ ] because he is not entitled to a

particular degree of liberty in prison'") (quoting *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994)); *Lile v. Simmons*, 929 P.2d 171, 173 (Kan. Ct. App. 1996) ("Kansas law does not create a constitutionally cognizable liberty interest in a prison inmate's movement from a higher to a lesser security status") (cited approvingly in *Bankes v. Simmons*, 963 P.2d 412, 420 (Kan. 1998)).

Prison administrators thus have constitutional leeway to grant more favorable housing and other privileges as a means of encouraging rehabilitation and preparing inmates for release. Indeed, it might be a dereliction of their duty not to do so. *See Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("another paramount objective of the corrections system is the rehabilitation of those committed to its custody").

Likewise, prison administrators should be free to withhold privileges previously bestowed in order to implement a rehabilitative incentive plan, *unless* doing so deprives an inmate of some type of liberty interest. *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) ("It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence") (limited in *Sandin v. Connor*, 515 U.S. 472, 482 (1995), because its approach did not provide *enough* deference to prison officials).

The changes in privileges that inmate Lile faces in this case serve nonpunitive purposes. The IMPP necessarily recognizes the fundamental prison management and rehabilitation proposition that an inmate who refuses to participate in recommended treatment should not continue to receive the benefits reserved for those who are actively working to rejoin society as productive citizens. Those who refuse to atone for their offenses by participating in required treatment in order to minimize the risk of reoffending are not being punished for invoking their Fifth Amendment privilege; they are only

experiencing the consequences of their deliberate choice to not cooperate in their rehabilitation.[5]

Adding new layers to the *Sandin* liberty interest/atypical hardship analysis unnecessarily undermines the goals of rehabilitating inmates and protecting society.

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[5] This proposition is poignantly illustrated by an exchange between the warden of Lansing prison, David R. McKune, and one of inmate Lile's attorneys, during McKune's deposition:

Q. Okay. And you've talked about a person—an inmate's decision to enter into the SATP program and other programs as their choice, is that correct?

A. Yes.

Q. You refer to it as a choice?

A. Yes.

Q. All right. And that they must deal with the consequences if they refuse not to choose to enter the program.

A. Correct.

Q. And that's how you see the incentive level system, correct?

A. Correct.

Q. You'd admit, then, that there's a price that they have to pay for making that choice, wouldn't you?

A. There are consequences of that choice, yes.

Q. Okay. So it's not a completely free and unfettered choice, is it?

A. Are there any?

Q. But—

A. I mean, there's consequences to every choice you make in life, and there are consequences to that choice as well.

J.A. 81-82.

B. The Prison Conditions Here Do Not Amount To Unconstitutional Compulsion Under The Court's Cases

1. *Fifth Amendment Cases*. Several of the Court's cases demonstrate that unconstitutional "compulsion" in the prison setting must be limited to those circumstances involving the imposition of *atypical hardships*. Indeed, the Court frequently has refused to find unconstitutional compulsion when consequences at least as "substantial and potent" as those at issue here were imposed.

For example, in *Ohio Adult Parole Authority. v. Woodard*, 523 U.S. at 286, this Court recently held that—consistent with the Fifth Amendment—a death row inmate could be made to choose between incriminating himself or having adverse inferences drawn from his silence at his clemency interview:

> Assuming also that the Authority will draw adverse inferences from respondent's refusal to answer questions . . . we do not think that respondent's testimony at a clemency interview could be "compelled" within the meaning of the Fifth Amendment . . . . He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment.

The Tenth Circuit purported to distinguish *Woodard* on the ground that "Mr. Woodard was not being punished for invoking the Fifth Amendment privilege. Rather, the clemency interview was voluntary." Pet. App. 20a-21a.

But that reasoning begs the question, which is whether Woodard had a "voluntary" choice for constitutional purposes. To say that inmate Lile was "punished" for his silence while inmate Woodard was *not* seems backward: while neither inmate's actual sentence was changed as a result of his silence, "[i]n *Woodard*, plaintiff did not face a possible loss of privileges and benefits, but rather a possible *loss of life*."

Searcy v. Simmons, 97 F. Supp. 2d 1055, 1059 (D. Kan. 2000) (emphasis added).[6] No plausible argument can be made that inmate Lile faces more serious consequences for his choice here than inmate Woodard faced in that case.

Similarly, in *Minnesota v. Murphy*, 465 U.S. 420 (1984), the Court held that the Fifth Amendment was not violated when a parolee was questioned by his parole officer about prior criminal activity. In *Murphy*, the parolee had been warned that failure to be truthful could result in revocation of parole. Moreover, the parole officer was actively seeking incriminating evidence to return the parolee to jail. Even so, the Court found no constitutional violation.

The Tenth Circuit, however, purported to distinguish *Murphy*, opining that, unlike inmate Lile, "Mr. Murphy was not punished or penalized *solely* for choosing to remain silent." Pet. App. 22a. Of course, in a sense this was true, because Mr. Murphy *did not remain silent*—he talked—and the Court upheld the use of his statements against him.

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[6] *See Woodard*, 523 U.S. at 293 (Stevens, J., concurring and dissenting opinion) ("The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in [the Court's prior] cases"); *Searcy v. Simmons*, 97 F. Supp. 2d at 1059 ("If such a choice is not sufficient compulsion to make incriminating statements involuntary, the application of IMPP 11-101—even in its most severe application—could hardly be sufficient"); *Reed v. McKune*, No. 98-3418, 2000 WL 1278488, at *8 (D. Kan. July 17, 2000) ("That the plaintiff's refusal to take part in the SATP triggers a reduction in incentive level status does not transform his decision not to participate into an involuntary one"); *Amen-Ra v. Dep't of Defense*, 961 F. Supp. 256, 259 (D. Kan. 1997) (describing rehabilitation program as voluntary despite the fact that "custody elevation, detail changes, and other favorable considerations" were tied to participation); *Russell v. Eaves*, 722 F. Supp. 558, 560 (E.D. Mo. 1989) (finding that inmate was free to "refuse to participate" even though denial of parole was a consequence); *Brooker v. Warden*, No. 98-466-JD, 1999 WL 813893 (D.N.H. June 22, 1999) (same).

The Tenth Circuit reasoned that Murphy just suffered "the normal consequences flowing from his confession." *Id.* But this is not a satisfactory distinction. First of all, inmate Lile is not being punished for his silence; he is facing the normal consequences of refusing to participate in a valuable rehabilitation program while in prison. Second, in *Murphy*, the state threatened to return Murphy *to prison* if he did not answer all questions put to him by his parole officer.

By comparison, in this case, inmate Lile (a prisoner currently and for the past almost twenty years), faces only a transfer to what he considers a less desirable housing assignment in a section of the prison contiguous to his current location and the loss of related privileges, such as a personal television. Moreover, the information that he is refusing to provide is directly related to his rehabilitation program, and is sought for a therapeutic purpose. The state is not actively investigating him with respect to any additional possible criminal offenses.[7]

Finally, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court held that negative inferences could be drawn from an

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[7] The Tenth Circuit also relied on a footnote in *Murphy* in which the Court opined that "a state may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding." 465 U.S. at 435 n.7. However, Justice White, author of the Court's opinion in *Murphy*, later cautioned that any "assumption that this Court's decision in *Minnesota v. Murphy* mandates . . . immunity from prosecution based upon incriminating statements made to a therapist . . . reflect a possible misunderstanding of [a State's] obligations under the law." *Montana v. Imlay*, 506 U.S. 5, 8 (1992) (White, J., dissenting from dismissal of writ of certiorari as improvidently granted). *Cf. McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[*Minnesota v. Murphy*, 465 U.S. 420 (1984)] does not, however, overrule the Court's earlier cases that state that the government can penalize someone for refusing to cooperate on government matters, even when the person does so by invoking his privilege against self-incrimination").

inmate's silence in a prison disciplinary hearing without violating the Fifth Amendment. The Court reached that conclusion because "[d]isciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime." *Id.* at 319. In *Baxter* the Court declared that:

> It is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In this respect, this case is very different from the circumstances before the Court in the *Garrity - Lefkowitz* decisions, where refusal to submit to interrogation and to waive Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State.

425 U.S. at 317-18 (referring to *Garrity v. New Jersey*, 385 U.S. 493 (1967), which held that police officers questioned concerning the alleged fixing of traffic tickets in their boroughs could not be threatened with loss of employment for refusing to answer, and *Lefkowitz v. Turley*, 414 U.S. 70 (1973), which held that a statute precluding the awarding of a government contract to any person refusing to answer questions concerning state contracts violated the Fifth Amendment).

The Tenth Circuit, however, purported to distinguish *Baxter* too, opining that "[h]ere, unlike in *Baxter*, Plaintiff's refusal to submit to the interrogation . . . standing alone, would certainly result in the [adverse consequences]." Pet. App. 19a. The Tenth Circuit's analysis, however, ignores that it is not inmate Lile's *silence alone*, but rather (1) his *conviction* of a violent, sexual offense, (2) *plus* a legitimate recommendation for participation in sex offender treatment in prison, (3) *plus* his refusal to participate in that treatment, which results in the withholding of prison privileges. Thus, the Tenth Circuit's

efforts to distinguish cases notwithstanding, this case falls within the *Woodard/Murphy/Baxter* line of cases.[8]

2. *Ex Post Facto Cases.* Because the Tenth Circuit appears to have rested its finding of "compulsion" in this case on characterizing the changing or withholding of prison privileges as the imposition of an impermissible "penalty" or "punishment" on inmate Lile, the issue here is similar to the issue raised in *ex post facto* cases.

For *ex post facto* purposes, similar to the Fifth Amendment compulsion inquiry, the critical question is whether the prison regulation "increases the penalty by which a crime is punishable." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 506 (1995). And this Court has previously equated the notion of "punishment" under various constitutional provisions. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) ("Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims").

The Kansas SATP already has withstood *ex post facto* challenges. *See, e.g., Reed v. McKune*, No. 98-3418, 2000 WL 1278488, *6 (D. Kan. July 17, 2000) (finding "no evidence . . . that plaintiff's punishment has been increased"); *Johnston v. Simmons*, No. 97-3354, 1999 U.S. Dist. LEXIS 21891, *8-9 (D. Kan. May 26, 1999) ("While his refusal has resulted in the

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[8] *See McMorrow v. Little*, 109 F.3d at 436 ("[P]rison officials may constitutionally deny benefits to a prisoner who, by invoking his privilege against self-incrimination, refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation and not his invocation of his privilege"); *cf. Asherman v. Meachum*, 957 F.2d 978, 982 (2d Cir. 1992) ("The fact that a public employee might face the unpleasant choice of surrendering his silence or losing his job is no bar to an adverse consequence so long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right").

loss of privileges under IMPP 11-101, this loss is not an *ex post facto* violation. Plaintiff does not allege that IMPP 11-101 affects his eligibility for parole. His sentence is therefore no different than it was before defendant applied IMPP 11-101.") (internal citations omitted); *Johnston v. Simmons*, 45 F. Supp. 2d 1220, 1224 (D. Kan. 1999) ("Courts have found that the portions of IMPP 11-101 which allow the reduction in incentive level are not *ex post facto* violations because they do not increase an inmate's punishment"); *Nemecheck v. McKune*, 941 P.2d 952, 954 (Kan. Ct. App. 1997) ("Reasonable application of a prison security classification system does not amount to increased punishment . . . .").

In addition, there are numerous cases finding no *ex post facto* violation in similar situations. *See, e.g., Dominique v. Weld*, 73 F.3d 1156, 1163 (1st Cir. 1996) ("It can be argued that the regulation increases the penalty because it subjects Dominique to a different and stricter prison regime: unless and until he successfully completes the prescribed treatment program and admits to a crime he continually has denied, he must remain confined at no less than a medium security facility and remain ineligible for privileges associated with lower security imprisonment. We conclude, however, that this change in the conditions determining the nature of his confinement while serving his sentence was an allowed alteration in the prevailing 'legal regime' rather than an 'increased penalty' for *ex post facto* purposes . . . . The change does not affect the length of Dominique's sentence or his parole options."); *see also Neal v. Shimoda*, 131 F.3d 818, 827 (9th Cir. 1997) ("[T]he treatment program is intended to be rehabilitative, not retributive"); *Brooker v. Warden*, No. 98-466, 1999 WL 813893, *7 (D.N.H. June 22, 1999) ("The addition of sexual offender programming did not necessarily lengthen the time that an inmate must spend in prison. Instead, its effect depends entirely on the prisoner's experience in the program."); *Russell v. Eaves*, 722 F. Supp. 558, 560 (E.D. Mo. 1989) ("[Missouri Sexual Offender Program] is not

penal in nature; its purpose is rehabilitative. It adds no further sentence to that which has already been imposed upon the sex offender.").

C. The Tenth Circuit's Decision Is Contrary To The History And Origins Of The Fifth Amendment

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In this case, the Tenth Circuit correctly noted that the amendment's language is "somewhat narrow." Pet. App. 5a. That court also opined that this Court has "interpreted [the amendment] broadly." *Id.* (referring to *In re Gault*, 387 U.S. 1, 50 (1967)). But in so doing, the Tenth Circuit ignored the limitation imposed by the very passage it quoted from *Gault*—that the privilege is to be "broadly applied and generously implemented *in accordance with the teaching of the history of the privilege*." 387 U.S. at 50 (emphasis added). Indeed, the Tenth Circuit engaged in *no* historical analysis in this case.

History is particularly important in this context. "[T]he privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" *Ullmann v. United States*, 350 U.S. 422, 438 (1956) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)); *see also* Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* xv (2d ed., Macmillan 1986) (1968) ("[T]he courts have assured us, again and again, that our understanding of the right against compulsory self-incrimination is dependent upon history").

For purposes of this case, it is important to recognize that "the development of [the Fifth Amendment] protection was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber." *Andresen v. Maryland*, 427 U.S. 463, 470 (1976).

When brought before the Star Chamber, accused individuals could either take an oath to answer all questions truthfully or be whipped. Mark Berger, *Taking the Fifth: The Supreme Court and the Privilege Against Self-Incrimination* 17 (1980). Thus, a central purpose of the privilege is to ensure that government "may not be coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964). And it is certainly true that the Court "has thought the privilege necessary to prevent any 'recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'" *Couch v. United States*, 409 U.S. 322, 327 (1973) (quoting *Ullmann*, 350 U.S. at 428).

But, historically, the privilege protected individuals from government efforts to force them to assist in the investigation and prosecution of criminal charges against them; it did not forbid the denial of government benefits or privileges to those who chose to remain silent. In this prison case, the words of Justice Stewart remind of the narrower scope of consequences historically deemed "compulsion":

> When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a farreaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

Griffin v. California, 380 U.S. 609, 620 (1965) (Stewart, J., dissenting).

Withholding from inmate Lile—because of his refusal to engage in a therapeutic treatment program—privileges such as a personal television or greater access to the gym does not

even begin to approach the consequences of "incarceration, banishment, or mutilation." Indeed, the full consequences inmate Lile faces for refusing to participate in sex offender treatment are as follows:

> Specifically, he [inmate Lile] would lose his personal TV; he would have limited access to prison organizations and activities and would be unable to participate in the IMPP [the prison's Internal Management Policies and Procedures programs]; he would have limited access to the gym and yard area; there would be a substantial reduction in the amount of money he could spend in the canteen per pay period, from $140 per payroll at Level III to $20 per payroll at Level I; he would receive a reduction in pay and intake property; and he would have substantially restricted visitation privileges.

Pet. App. 10a.

Importantly, inmate Lile would not be denied parole nor lose any good time credits (nor the opportunity to earn such credits) because he refused to participate in the SATP. *Id.* at 10a-13a. Thus, his *sentence* would remain unchanged, notwithstanding his refusal to participate in the SATP.

None of these consequences are anything other than the normal incidents of prison life; as such, their imposition is not unconstitutional compulsion. *See Sandin v. Conner*, 515 U.S. at 484 (holding that prison officials could place a prisoner in disciplinary segregation for thirty days without providing procedural due process because such segregation did not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"); *Meachum v. Fano*, 427 U.S. at 228 *rehearing denied* (noting that absent some state-created right, "prison officials have discretion to transfer [prisoners] for whatever reason or for no reason at all").

In its analysis of the adverse consequences facing inmate Lile, the Tenth Circuit twice pointed out that prison officials noted "how much more dangerous maximum security is." Pet. App. 18a. But that proposition is both erroneous as a factual matter and irrelevant as a legal matter. First, the Lansing prison warden testified repeatedly in his deposition that he does not consider the maximum security area to be inherently more dangerous than the medium security area. J.A. 76-81. Moreover, security is a function of *both* location within the prison *and* the inmate's custody classification. *Id.* at 59, 102-04. There are medium security *inmates* located in the maximum security area of the prison (and minimum security inmates located in the medium security area) for a variety of reasons, just as there are first degree murderers located in the minimum security areas. *Id.* at 60, 62-63, 102-04.

Second, as explained above, only the imposition of atypical hardships can possibly amount to unconstitutional "compulsion" in the prison setting. In this case, there is not a shred of evidence that any of the conditions existing in Lansing's maximum security area—considered individually or in combination—are atypical hardships. Thus, because the conditions in the maximum security area of the Kansas prison are normal incidents of prison life, an inmate cannot complain of spending part or all of his incarceration there. The history of the Fifth Amendment does not suggest otherwise.

II. State Prison Regulations That Serve Rehabilitative Purposes Are Entitled To Deference From The Federal Courts

A. The Tenth Circuit's Decision Fails To Accord The Proper Respect To State Prison Regulations

This Court has emphasized that, in the prison context, "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, 515 U.S. at 482. This is due

in no small part to the fact that, while "prisoners do not shed all constitutional rights at the prison gate, . . . '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Id.* at 485 (quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977)) (internal citation omitted); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) ("We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to 'substitute our judgment on . . . difficult and sensitive matters of institutional administration.'") (quoting *Block v. Rutherford*, 468 U.S. 576, 588 (1984)).

The significance of the prison setting in this case cannot be overstated. The impact of setting on the application of the privilege is present in the Fifth Amendment itself, which prohibits compulsion only "in any *criminal case*." U.S. Const. amend. V (emphasis added). Although the notion of a "criminal case" sometimes has been defined broadly, *see*, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (stating that the privilege extends to any "proceeding, civil or criminal, formal or informal, where answers might incriminate [the individual] in future criminal proceedings"), setting and context are central to the inquiry:

> When confronted with a Self-Incrimination Clause challenge involving a prison sex offender treatment program, a court should look first to other similar cases involving prisoners. This is the best approach for four reasons: first, as opposed to other settings, the prison setting is usually devoid of an ongoing criminal investigation;[9]

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[9] "Historically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth." *Couch*, 409 U.S. at 327;

> second, prison administrative regulations have historically been given deference not accorded in other settings; third, rehabilitation constitutes a legitimate government interest in the penal setting;[10] fourth, what constitutes a penalty outside prison does not automatically constitute a penalty in prison.

Stefan J. Padfield, Comment, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. Kan. L. Rev. 487, 506 (2001).

Thus, even if the Court were to conclude that the consequences inmate Lile faces in this case might amount to unconstitutional compulsion if imposed on a free citizen, the result is different in prison. "In the prison setting, refusal to verbalize acceptance of responsibility in sex offender treatment programs has been upheld as a constitutionally valid reason to deny all of the following: admission to a 'Family Reunion Program,' work release[,] less restrictive confinement, custody elevation[,] detail changes, good time credits, and parole." Padfield, 49 U. Kan. L. Rev. at 509 (citing cases).

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see also, *Lefkowitz v. Turley*, 414 U.S. at 77 ("The object of the Amendment 'was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.'") (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

[10] The Court has said that "since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody . . . . It is in light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." *Pell v. Procunier*, 417 U.S. at 823.

B. The Tenth Circuit Incorrectly Relied On The *Turner v. Safley*, 482 U.S. 78 (1987), Balancing Test

This Court has repeatedly emphasized that prison regulations are accorded a particular deference. *See, e.g., Turner v. Safley*, 482 U.S. 78 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977). Thus, in *Turner*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if 'prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.'" 482 U.S. at 89 (quoting *Jones*, 433 U.S. at 126).

The Court in *Turner* set out four "factors that are relevant in determining the reasonableness of the regulation at issue": (1) whether there is a valid, rational connection between the prison regulation or practice and a legitimate governmental interest; (2) whether the regulation or practice allows inmates an alternative means of exercising the subject constitutional right; (3) the impact of accommodation of the asserted right on guards, other inmates, and the allocation of resources generally; and (4) the absence of ready alternatives to the regulation or practice. *Id.* at 89-91.

The Tenth Circuit conceded that some deference was appropriate here, and it purported to accord deference via the *Turner* balancing test. Pet. App. 25a-32a. Unlike this Court in *Sandin v. Conner*, however, in which the deference to prison regulations resulted in finding no constitutional violation *at all*, the Tenth Circuit considered deference in this case only *after* concluding that a constitutional violation had occurred. Thus, the Tenth Circuit opined that its view of the *Turner* "balancing differs from Defendants' argument that government interest is significant in determining whether the Fifth Amendment has been violated because *we apply the*

balancing analysis only after a constitutional violation has been found." Pet. App. 26a n.12 (emphasis added). The Tenth Circuit then concluded that application of the *Turner* balancing test "easily" weighed in favor of inmate Lile. *Id.* at 32a.

The Tenth Circuit's application of the *Turner* balancing test in this case raises several questions: (1) Does *Turner* apply at all in Fifth Amendment cases? (2) If *Turner* applies, does the Court give deference to the Kansas prison regulations in the first instance in determining whether there is a constitutional violation at all, or only *after* finding a constitutional violation to determine whether the regulation is nonetheless permissible? (3) If *Turner* applies here, are all four factors appropriate to consider? The state addresses these questions in turn.

1. *Does Turner Apply To Fifth Amendment Claims?* It may be inappropriate to apply the *Turner* factors in the Fifth Amendment context. *Turner* involved claims under the First Amendment and the constitutional right to marry. Lower courts, including the Tenth Circuit, have recognized that application of the *Turner* factors to other constitutional claims may be inappropriate or problematic. *See, e.g., Michenfelder v. Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988) (noting that the second *Turner* factor is "much more meaningful in the first amendment context than the fourth, where the right is to be free from a particular wrong"); *Dunn v. White*, 880 F.2d 1188, 1194 n.3 (10th Cir. 1989) ("The *Turner* test appears analytically to have only limited applicability to a prisoner's fourth amendment challenge").

Moreover, it does not appear that the Court has ever applied *Turner* to a case involving the Fifth Amendment. Rather, what *Turner* represents is the fundamental proposition that prison regulations that arguably impinge on constitutional rights that free citizens would enjoy are not necessarily unconstitutional in the prison context. Indeed, *Turner* essentially is an application of the general principle of deferential review in the

particular context of prison regulations affecting First Amendment interests. *See, e.g., Foote v. Spiegel*, 995 F. Supp. 1347, 1349 n.2 (D. Utah 1998) ("[T]his court determines that the Supreme Court's decision in *Washington* [*v. Harper*, 494 U.S. 210 (1990)] only commands use of the *Turner* 'standard of review' (i.e., reasonableness instead of strict scrutiny) when assessing prisoners' or detainees' constitutional claims; it does not command the use of the *Turner* factors themselves").

Thus, all that *Turner* calls for in this context is that the regulation be reasonably related to the governmental interest at stake. Holding inmates accountable for their rehabilitation—which in the case of sex offenders demands full acceptance of responsibility—is reasonably related to the government's interests in rehabilitation and safety.

Or, to put it another way, the central and decisive inquiry in this case is whether—taking into account the prison setting and the purposes of the Kansas SATP—inmate Lile is being compelled to incriminate himself? Effectively, the deference to prison regulations that is inherent in *Turner* is subsumed in the "compulsion" inquiry, which must by necessity take careful account of the setting and context in which the Fifth Amendment claim arises.

2. *Does The Court Give Deference Before Or After Finding A Constitutional Violation?* In neither *Turner* itself nor *O'Lone v. Estate of Shabazz*, did this Court separate the finding of a constitutional violation from the required deference in First Amendment cases. Subsequently, in *Sandin v. Connor*, 515 U.S. at 482-83, a procedural due process case, this Court once again highlighted the historical deference given to state prison officials, but did so completely independent of any reference to the *Turner* balancing test.

Thus, had the Tenth Circuit properly accorded the Kansas prison regulations the required deference in determining whether there is a constitutional violation at all, that court

would never have reached the *Turner* balancing test. *See, e.g., Gilmore v. McKune*, 940 P.2d 78, 81 (Kan. Ct. App. 1997) ("Since courts should refrain from reviewing prison officials' decisions regarding [the transfer of inmates refusing to participate in sex offender treatment], the district court and this court could have summarily dismissed on that basis") (citing *Sandin*). Instead, the Tenth Circuit incorrectly found a Fifth Amendment violation without first "giving appropriate deference to the decisions of prison administrators." *Jones*, 433 U.S. at 125.

It seems illogical to say—as the Tenth Circuit essentially did—that a prison regulation violates an inmate's constitutional rights but nonetheless may be valid. What *Turner* really stands for, and what this Court's cases consistently recognize, is that prison inmates do not necessarily have the same constitutional freedoms as free citizens. Prison regulations that are reasonably related to legitimate penological objectives generally do not violate the Constitution. Ultimately, as many lower courts have recognized, *Turner* adopts a deferential standard of review for inmates' claims of constitutional violations.

3. *If Turner Applies, In What Form?* Even were this Court to conclude that the *Turner* balancing test applies in some form in Fifth Amendment cases, the Tenth Circuit's application of *Turner* in this case was improper. First, although the Tenth Circuit acknowledged that "[t]here is a rational connection between the policy of having prisoners admit responsibility for their offenses and disclose their sexual history in order to participate in the SATP and the legitimate governmental interest in rehabilitation of sex offenders," Pet. App. 28a, the court devoted only two sentences to discussing that factor and failed to give it appropriate weight. Inmate Lile is a convicted, violent sex offender who was found guilty of

rape, aggravated sodomy, and aggravated kidnapping.[11] As such, he is part of a population that poses unique challenges to prison administrators and society:

> The problem of the sex offender is an all too real one. Nearly 355,000 rapes and sexual assaults were reported in 1995. The American Professional Society on the Abuse of Children (APSAC) has noted that as many as 10-15% of boys and 20-25% of girls are victims of sexual misuse prior to the age of 18. The median age of abuse for boys is 9.9 years; for girls, 9.6. Eighty percent of psychiatric inpatients report having experienced some form of sexual abuse. Many adolescent prostitutes and runaways are victims of childhood sexual abuse. Most sex offenders have multiple victims and offend numerous times with the same victim.
>
> Prison populations reflect the problem of the sex offender in society at large. In some states, as much as one third of the prison population consists of sexual offenders. Of the 60,285 prisoners serving time in state prisons for crimes against children, 42,993 of them were incarcerated for rape and sexual assault, and 25,102 of those had victims under the age of twelve. Providing treatment for sex offenders has become recognized as a legitimate state interest.
>
> * * * * *
>
> Without acceptance of responsibility, the key goals of treatment are stymied. Denial precludes addressing cognitive distortions, developing empathy for victims, identifying risk factors that may serve as warning signals, developing much needed social skills, and examining deviant sexual arousal. It is, therefore, no wonder that the

---

[11] *See Lile v. Simmons*, 929 P.2d at 172 (further noting that "in 1983, Lile was also convicted of attempted aggravated escape from custody"); *see also Lile v. Simmons*, No. 00-3172, 2001 U.S. Dist. LEXIS 5518, *5 (D. Kan. Apr. 20, 2001).

> United States Department of Justice has identified admission of responsibility as a basic requirement for treatment and that the American Bar Association has concluded that individuals who deny responsibility are not amenable to treatment . . . . In addition, the disincentives for refusing treatment keep offenders active in treatment long enough to break through their psychological defenses that would otherwise result in their choice to terminate treatment before any positive change occurred.

Stefan J. Padfield, Comment, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. Kan. L. Rev. 487, 496-99 (2001) (internal citations omitted).

In contrast to its cursory treatment of the state's interests in this case, the Tenth Circuit focused on the "obvious, easy alternative" of granting immunity to inmates participating in the SATP. Indeed, it appears that the Tenth Circuit actually rested its ultimate conclusion on this single factor: "Because granting immunity or privileging statements in no way restricts the State's interests in rehabilitation or public safety, we think the *Turner* balancing test easily weighs in favor of Plaintiff." Pet. App 32a. This ignores that

> [because] many sex offenders have multiple victims and may not be amenable to treatment, society's safety may depend on a future prosecution for a past crime. Should immunity be granted to SATP participants, the burden will be on the prosecution in any later trial to prove that its evidence did not come from program disclosures.

49 U. Kan. L. Rev., at 514-15.

At bottom, even if *Turner* applies in some form, the Tenth Circuit failed to properly weigh the interests at stake.

C. The Ability To Bestow Or Withhold Correctional Institution Privileges Is An Extremely Important Rehabilitation Tool For Prison Administrators

Prison administrators commonly rely upon the granting or withholding of prison privileges to manage inmate populations, both for rehabilitative purposes and to ensure safety within the prisons. Indeed, such authority is essential to successful, constructive prison management.

This case highlights the importance of permitting prison administrators some discretion in developing and implementing incentive programs. Indeed, as inmate Lile has amply demonstrated, if the incentives here are not valid, there is no way Kansas will obtain Lile's participation in a meaningful treatment program, unless the State is willing to sacrifice other interests, such as the possible prosecution of unknown offenses.[12]

The Court previously granted review of a similar Fifth Amendment issue in a case involving the related context of probation. At that time, one neutral *amicus* pointed out the importance of incentives for effective sex offender treatment:

> Denial is a common phenomenon in offender treatment. As treatment has become more sophisticated, methods for overcoming denial and encouraging honesty have been developed. Certain offenders continue to deny the abuse, however, despite the best efforts of therapists . . . . Efforts to provide meaningful offender treatment will be severely undermined unless offenders can be required to admit the

---

[12] It is worth noting that inmate Lile has been in prison for almost 20 years. This makes it highly unlikely that he even could be prosecuted for any unknown offenses he might now disclose in a treatment program—due to statutes of limitations—and yet it demonstrates how difficult it can be for prison administrators to persuade inmates to take advantage of beneficial opportunities such as the Kansas SATP.

> abuse as a precondition to treatment, and unless failure to admit can lead to termination of treatment and revocation of probation or parole.

Brief of *Amicus Curiae* American Professional Society on the Abuse of Children Supporting Neither Party at 2, 8, in *Montana v. Imlay*, No. 91-687; *see also* Judith V. Becker & William D. Murphy, *What We Know And Do Not Know About Assessing And Treating Sex Offenders*, 4 Psychology, Pub. Pol'y & L. 116, 121-22 (1998) ("The key part of any assessment of an offender is the collection of a detailed psychosocial and psychosexual history").

Another frequent reality in the prison context is limited resources. Kansas does not have unlimited beds for incarcerated sex offenders to participate in the SATP. Instead, to some extent, Kansas prison administrators must prioritize and ration those opportunities. An inmate such as Lile should not be permitted to nonetheless drain those limited resources, by occupying a space in the program, to the detriment of other inmates who have demonstrated a willingness to engage in meaningful treatment on the program's terms, rather than only on their own terms.

The Court long has recognized the important role that acceptance of responsibility plays in rehabilitation efforts. Such acceptance demonstrates that an offender "is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady v. United States*, 397 U.S. 742, 753 (1970).

There is nothing irrational or arbitrary about denying that opportunity to inmate Lile once he has made clear that he refuses to cooperate in obtaining meaningful treatment. Thus, he would not be punished for asserting his Fifth Amendment privilege; rather, he would be denied the continuation of

certain privileges because he has demonstrated that he no longer qualifies for more lenient prison conditions.[13]

Prison administrators need a definitive answer to the question presented in this case, in order to determine how best to attempt to rehabilitate dangerous, violent sex offenders in order to improve such offenders' lives and to protect the public safety. Sex offender treatment programs have proven effective, but they will be much less so absent strong incentives for these troubled inmates to participate, and to participate in a meaningful fashion.[14] The Kansas SATP is a step in the right direction; it should not be held to violate the Constitution.

---

[13] The Kansas Secretary of Corrections, Charles Simmons, made this point well in his deposition when he stated as follows:

> [I]t makes no sense to have someone who's not participating in a program taking up a bed in a setting where someone else who may be willing to participate in a program could occupy that bed and participate in a program. Inmates don't get a choice of where to live. Those assignments are made by the corrections officials, and in doing that, we have to look at the overall management responsibilities and operations that we have in making sure the department runs as best it can.

J.A. 99.

[14] Indeed, another aspect of this situation are the sex offender civil commitment statutes that the Court has addressed in recent years. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Crane*, No. 00-957 (pending on the merits). Experience has shown that many dangerous sex offenders—for a variety of reasons—will refuse to participate in prison treatment programs absent strong incentives to do so. When these offenders fail to take advantage of such programs, the chances increase that the State may conclude that it is necessary to attempt to involuntarily commit (for residential care and treatment) some of these individuals upon their release from prison. That result might be unnecessary if sex offenders, many of whom are serving sentences of considerable length, would avail themselves of meaningful, prison treatment programs such as the Kansas SATP.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court reverse the decision of the Tenth Circuit, and hold that the acceptance of responsibility requirement of the Kansas sexual abuse treatment program is constitutional.

Respectfully submitted,

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July 2001

(3)

Supreme Court, U.S.
FILED
AUG 13 2001
CLERK

No. 00-1187

In The

Supreme Court of the United States

DAVID R. MCKUNE, Warden
and CHARLES SIMMONS, Secretary,
Kansas Department of Corrections,

Petitioners,

v.

ROBERT G. LILE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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52 pp

QUESTION PRESENTED

Whether, upon an inmate's invocation of his Fifth Amendment right against self-incrimination, transferring him to maximum security and imposing corresponding sanctions constitutes compulsion?

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STATEMENT OF THE CASE

1. Nature of the Case.

Respondent Robert Lile is an inmate in medium security at the Lansing Correctional Facility in Lansing, Kansas. He refuses to incriminate himself by participating in Kansas' sexual abuse treatment program ("SATP"). The State violates Mr. Lile's Fifth Amendment right against self-incrimination because it demands incriminating information. The State, despite contending that SATP is voluntary, compels such admissions by threatening sanctions.[1] Mr. Lile can choose to admit crimes and face prosecution or remain quiet and be punished for his silence.

2. Prison Policies and Classifications.

Mr. Lile was convicted of rape, aggravated sodomy, and aggravated kidnapping in 1983. *State v. Lile*, 699 P.2d 456, 457 (Kan. 1985). Mr. Lile pled not guilty and testified at trial. Because Mr. Lile was convicted of a sex offense, the State added SATP to his Inmate Program Agreement

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[1] Mr. Lile also objected to the State's use of penile plethysmograph testing in SATP. The State's penile plethysmograph testing involves "a pressure-sensitive ring which is placed around a subject's penis to measure and record increases in penis size in response to various audio recordings of projective sexual scenarios presented from the perspective of a person committing a sexual offense." Petitioners' Appendix ("Pet. App.") 47a. Mr. Lile argued that this intrusion violated his right to privacy. *Id.* The District Court disagreed, Pet. App. 54a, and the Tenth Circuit found Mr. Lile's claim moot once it found in his favor on his Fifth Amendment claim. Pet. App. 32a.

in 1994. Pet. App. 3a-4a. As part of SATP, the State demanded that Mr. Lile sign a form entitled "Admission of Guilt" which acknowledges that he committed the crimes for which he is in prison. Joint Appendix ("J.A.") 30.[2]

The State also provided Mr. Lile with an "Abbreviated Sexual History Form," which asked him to list every victim "you have molested or otherwise offended against." J.A. 32-33. The form also asked Mr. Lile to "[b]e sure and list every different act you did with this victim(s). Did you have any intercourse, oral sex, digital penetration and/or any other combination, etc." J.A. 32. The form also asked for the victim's name, age, relationship to the inmate, and where the act occurred, and "to be explicit in detail. . . . " J.A. 32. In case he needed to catalog additional sexual offenses, the State provided additional forms. J.A. 32. If Mr. Lile had completed this sexual history form, the State would then have checked his statements through polygraph testing. Pet. App. 35a.

When Mr. Lile invoked his Fifth Amendment rights and refused to sign the forms, he automatically became subject to the State's Internal Management Policy and Procedure system ("IMPP"). Under the terms of IMPP, Mr. Lile would have moved from Level III to Level I because of his invocation. J.A. 19; Petitioners' Brief ("Pet. Brief") 6. Transfer to Level I is mandatory for an inmate who refuses to participate in "recommended programs."

---

[2] As a result of Mr. Lile's lawsuit, the State changed the title of its "Admission of Guilt" form to "Admission of Responsibility" and added that SATP was a voluntary program. Pet. App. 34a.

J.A. 19. This is the same sanction imposed for anyone who, while in prison, is charged with a felony or receives a disciplinary conviction for theft, arson, assault, battery, or an aggravated sexual act. J.A. 19-20.

Inmates moved from Level III to Level I receive the following sanctions: (1) they are limited to what they may keep in their cell; (2) they are ineligible to participate in certain prison programming and activities; (3) they cannot receive authorization to send out more than $30.00 per pay period; (4) they are limited to how much they can spend at the canteen; (5) they are limited to how much they can earn per day; and (6) the State restricts their visitation (i.e., instead of receiving visits from anyone, inmates kept at Level I can only receive visits from attorneys, clergy, law enforcement officials, and immediate family). J.A. 27-28.

Petitioner Charles Simmons, the Secretary of the State's Department of Corrections, acknowledges that transfer to Level I is punishment:

> Q. Are inmates who don't obey the rules at the Lansing Correctional Facility punished?
>
> A. Yes.
>
> Q. And how – in what ways are they punished?
>
> A. Well, they're – depends on the classification of the disciplinary rule that they violate. There are three classifications. Level I is the – or Severity Level I is the most severe violations and Level III the least severe, and

there are sanctions that go with each of these.

J.A. 91.

Not only did Mr. Lile face a move to Level I, he also would have been moved from medium security to maximum security. Pet. Brief 6-7. Mr. Lile has fairly free movement within his medium security unit; he maintains a key to his cell and can move throughout his unit between 5:30 p.m. and 8 p.m. J.A. 42-43. In maximum security, the State restricts this movement. J.A. 42. He would be permitted to leave his cell only for scheduled programs, work, meals, or for previously scheduled time in the prison library or grounds. J.A. 42.

Petitioner Simmons recognizes that a transfer to maximum security is punishment:

> Q. So you would agree, then, that a change in a person's housing inside the institution is used as a form of punishment?
>
> A. Through the disciplinary process, it is, yes.
>
> * * *
>
> Q. Has anyone – have you ever had an inmate who was punished in the disciplinary system by being moved from a medium security facility . . . to a maximum security facility?
>
> A. Very definitely. A serious disciplinary violation will – we use the term "bust your custody." It will cost you your custody. And by our classification procedure, you get sufficient points with that disciplinary violation that it will result in your classification being moved from minimum to maybe even maximum security, but certainly from medium to maximum if you get that sort of disciplinary violation.

J.A. 92, 94. Moreover, the State admits violence or danger is more likely in maximum security because "more violent inmates" are housed there. J.A. 96-97.

SUMMARY OF THE ARGUMENT

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. It guarantees a person's right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer *no* penalty . . . for such silence." *Estelle v. Smith*, 451 U.S. 454, 468 (1981) (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (emphasis added)).

The State suggests that SATP does not violate the Fifth Amendment because it is a voluntary program. It makes this assertion while at the same time acknowledging that should Mr. Lile invoke his Fifth Amendment rights, the State will transfer him to maximum security and punish him with penalties imposed for only the "most severe violations" in prison. When applied to inmates outside SATP, these sanctions are viewed as punishments; when someone in SATP invokes his constitutional rights, the State suggests that these same punishments are merely the State's way of encouraging participation.

Indeed, Mr. Lile would like to participate in SATP today. He has participated in prison programs before and has benefitted from them. But for Mr. Lile to participate to the State's satisfaction in SATP, he must admit that he committed the crimes for which he was convicted, despite his insistence that he is not guilty. Furthermore, he must list, in exacting detail, all other sexual offenses for which he has never been charged. The State would then gauge the veracity of any such statements through polygraph testing.

If Mr. Lile states that he committed the crime for which he was convicted, the State can prosecute him for perjury. He would also lose any chance he might have for a new trial based upon newly-discovered evidence. If he admits to any previously uncharged sexual offense involving a child, prison officials *must* report him.

The State concedes that it seeks incriminating information from Mr. Lile. It attempts to minimize this by making two points, both flawed. The first is that, to the best of its knowledge, the State has never prosecuted anyone for a previously unreported crime (although the State has conceded that it will report any prosecutable information). Pet. App. 7a.[3] The second is that SATP is

---

[3] Whether an inmate has been charged or prosecuted for previously undisclosed crimes is irrelevant. *See* Pet. Brief. 4. Perhaps no inmate in SATP has ever committed a sexual offense for which he is not currently incarcerated. Perhaps no inmate has decided to be open with such information. The critical point is that the State seeks this incriminating information, and, if it gets it, the State has *no* discretion in deciding whether to report it. *See* Kan. Stat. Ann. 38-1522 (2000). *See also* Op. Kan. Att'y Gen. No. 94-67 (clarifying any ambiguities within this statute by stating that a psychologist employed at a state treatment facility must report any disclosures and communications made during a court-ordered examination by a convicted sex offender regarding the sex offender's suspected sexual abuse or molestation of a child). J.A. 167.

not designed to uncover such information, but is directed at the notion that sexual offender therapy cannot be beneficial unless the prisoner admits responsibility.

There are workable solutions that would enable the State to meet its goals of rehabilitation. As both the District Court and Tenth Circuit ruled, the State can immunize Mr. Lile for any incriminating statements he makes. This protection would ensure the candid exchange that the State claims it needs for SATP. Then, if Mr. Lile chose not to participate, the State could exact the penalties they seek here.

Alternatively, the State could place all sex offenders in maximum security and Level I the moment they arrive at prison. If an inmate wanted to *better* his situation, he could take part in SATP. Doing so might mean that the inmate could move to Level III and minimum or medium security, thereby eliminating the punitive nature of SATP.

Both solutions would uphold the Constitution and allow the State to operate SATP to achieve its stated goals of rehabilitation, without exacting any penalty for Mr. Lile's invocation of his Fifth Amendment rights. The Tenth Circuit's decision was correct, and Mr. Lile respectfully requests that this Court affirm it.

ARGUMENT

I. The State's Operation of SATP Amounts to Unconstitutional Compulsion.

The Fifth Amendment right against self-incrimination is "the mainstay of our adversary system of criminal justice." *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966). It is to be "broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom." *In re Gault*, 387 U.S. 1, 50 (1967); *see also Maness v. Meyers*, 419 U.S. 449, 461 (1975) ("This Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action.").

Mr. Lile agrees with the State that this case hinges on whether the State's system of sanctions amounts to unconstitutional compulsion under the Fifth Amendment. *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (quoting *Feldman v. United States*, 322 U.S. 487, 489 (1944)) (citations omitted) ("This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, must be accorded liberal construction in favor of the right it was intended to secure.").

In this case, Mr. Lile faces compulsion. The State demands participation in SATP and, at the same time, demands that Mr. Lile surrender his Fifth Amendment rights. It forces compliance through sanctions and the real prospect of personal violence. This Court should not permit the State to punish inmates like Mr. Lile, especially when simple alternatives exist that would not only

preserve the Fifth Amendment but improve the efficiency of SATP.

A. A Fifth Amendment claim does not require a liberty interest.

The State argues that this Court should employ its liberty interest test under the Due Process Clause of the Fourteenth Amendment from *Sandin v. Conner*, 515 U.S. 472 (1995), when analyzing "compulsion" within the self-incrimination privilege of the Fifth Amendment. In *Sandin*, this Court held that prison segregation does not rise to the level of a protected liberty interest under the Due Process Clause unless it imposes "atypical" and "significant" hardships on the inmate in relation to the ordinary incidents of prison life. *Id.* at 486.

This Court in *Sandin* reasserted its central holding from *Meachum v. Fano*, 427 U.S. 215 (1976), that the Due Process Clause of the Fourteenth Amendment does not require a hearing before a prisoner is transferred from one state prison to another having harsher conditions, unless a state law or practice creates a liberty interest in continued confinement at the first prison. *Sandin*, 515 U.S. at 483. Leaping from *Sandin*'s due process analysis to self-incrimination, the State, in turn, urges that "the touchstone for unconstitutional compulsion in the prison setting is the imposition of atypical hardships." Pet. Brief 15. Courts considering analogous claims have reached the opposite conclusion.

For example, in analyzing *Meachum*, the First Circuit Court of Appeals declined to rely on the dicta cited by the State in its brief that "prison officials have discretion

to transfer [prisoners] for whatever reason or no reason at all." *Furtado v. Bishop*, 604 F.2d 80, 87 n.6 (1st Cir. 1979). The court explained that "we understand this statement to describe the applicable Massachusetts law in that case and not to constitute a pronouncement that a transfer can never violate the Constitution." *Id.* The court in *Furtado* held that nothing in this Court's due process decisions "expressly ruled out a challenge to a transfer to segregation on the ground that it violated constitutional rights other than the right to procedural due process of law." *Id.* at 87.

In fact, in the sister case to *Meachum* that was before this Court at the same time, *Montanye v. Haymes*, 427 U.S. 236 (1976), this Court noted that "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him *and is not otherwise violative of the Constitution*, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Id.* at 242 (emphasis added); *see also Olim v. Wakinekona*, 461 U.S. 238, 248 n.9 (1983) (citing *Montanye*, this Court reiterated that a state may place an inmate in any penal institution unless "the reason for confining the inmate in a particular institution is constitutionally impermissible").

Other courts have interpreted *Meachum* similarly. As the Tenth Circuit Court of Appeals noted in *Frazier v. DuBois*, "*Meachum* addressed only the Due Process Clause, and it did not preclude the possibility that a transfer might violate other constitutional provisions." 922 F.2d 560, 561 (10th Cir. 1990).

> "While a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution."

Id. at 561-62 (citing *Murphy v. Missouri Dep't of Corr.*, 769 F.2d 502, 503 (8th Cir. 1985)).[4]

In *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978), an inmate claimed that the state transferred him to another, less desirable prison because he was performing legal services for other inmates. As the State does in its brief, Indiana argued that it could transfer an inmate "for whatever reason or for no reason at all." The Seventh Circuit disagreed, noting that "while plaintiff may not have a due process interest or expectation in remaining at the

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[4] *See also Meriwether v. Coughlin*, 879 F.2d 1037, 1045 (2d Cir. 1989) (citing *Meachum* and *Montanye*, the court stated that while officials have discretion to transfer prisoners, "[t]hey may not, however, transfer them solely in retaliation for the exercise of their constitutional rights."); *Jackson v. Cain*, 864 F.2d 1235, 1248 n.3 (5th Cir. 1989) ("It is important to note that the prison officials could have transferred Jackson to any job for almost any reason or no reason at all, and he would have had no claim. But while this decision may be arbitrary, it may not be retaliatory against Jackson's exercise of constitutional rights."); *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir. 1979) (holding that "[a] prisoner does not have a right to a hearing before being transferred; indeed he can be transferred for no reason at all. . . . However, he may nevertheless establish a claim under § 1983 if the decision to transfer him was made by reason of his exercise of constitutionally protected First Amendment freedoms, . . . ").

same institution, he does have a First Amendment interest or expectation in not being punished for the exercise of activity protected under that provision." *Id.* at 229-30. *See also Kimberlin v. Quinlan*, 199 F.3d 496, 501 (D.C. Cir. 1999) ("*Sandin* did not change the law regarding whether a prison official violates a prisoner's right under the First Amendment by segregating the prisoner because of the content of a prisoner's communication with the media. . . . ").[5]

As the discussion above illustrates, the State's assertion that a liberty interest under the Due Process Clause must be at stake in order to find any constitutional violation has been repeatedly rejected by courts considering that issue. Most compelling, though, is the passage in *Sandin* that rejects just such an assertion:

> Prisoners such as Conner, of course, retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available.

Sandin, 515 U.S. 472, 487 n.11.

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[5] *See also Allah v. Seiverling*, 229 F.3d 220, 224 (3d Cir. 2000) (rejecting attempt to extend *Sandin* to non-due process claim: "Nor does *Sandin* preclude Allah's claim alleging that he was kept in administrative segregation in retaliation for filing civil rights suits against prison officials. . . . Retaliation may be actionable, however, even when that the retaliatory action does not involve a liberty interest."); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996); *Pratt v. Rowland*, 65 F.3d 802, 806-807 (9th Cir. 1995).

Notwithstanding this Court's own conclusion that its *Sandin* test will not apply to claims beyond the realm of the Due Process Clause, the State cites *Sandin* to support its assertion that: "Changing or withholding prison privileges in which an inmate has no constitutionally protected liberty interest, or subjecting an inmate to prison conditions that are not atypical, generally cannot violate the Constitution." Pet. Brief 11. The Tenth Circuit rightly rejected the State's attempt to expand *Sandin*'s liberty interest test to the arena of the self-incrimination privilege: "[N]owhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur." Pet. App. 14a.

Because many lawsuits filed by prisoners involve allegations of multiple constitutional violations, courts have separately analyzed the due process claims under *Sandin* but reviewed the non-due process claims according to this Court's past rulings on those individual claims.[6] The Tenth Circuit accordingly noted: "From our

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[6] *See, e.g., Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (analyzing due process claim under *Sandin*, examining First Amendment and Eighth Amendment claims without resorting to *Sandin*); *Orellana v. Kyle*, 65 F.3d 29, 32 (5th Cir. 1995) (analyzing prisoner's due process claim under *Sandin* but not analyzing his claim of a violation of the *ex post facto* clause under *Sandin*, stating "while, as *Sandin* noted, prisoners retain constitutional remedies under the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment, . . . the ambit of their potential Fourteenth Amendment due process liberty claims has been dramatically narrowed."); *Rimmer-Bey v. Brown*, 62 F.3d 789, 791 n.4 (6th Cir.

review of the cases, *Sandin* has not been expressly used to analyze any kind of constitutional right claimed by a prisoner other than a due process violation." Pet. Brief 14a.

Even one of this Court's most recent decisions on the Fifth Amendment underscores the State's misplaced reliance on *Sandin*. This Court's 1998 decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 283 (1998), involved both a due process claim and a Fifth Amendment self-incrimination claim raised in the context of a prison setting. This Court used *Sandin* solely for its analysis of the due process claim, not for Mr. Woodard's Fifth Amendment claim of self-incrimination. The *Woodard* Court might have reasoned that because Mr. Woodard had no liberty interest in clemency, there was no self-incrimination violation, but it did not.

There is no precedent, nor any reason, for this Court to adopt a liberty interest standard for Fifth Amendment claims.

B. The State penalizes Mr. Lile for invoking his Fifth Amendment rights.

The sanctions involved are plainly penalties. As this Court explained in *Spevack v. Klein*, 385 U.S. 511, 515 (1967), " 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly.' " *See also*

1995) (using *Sandin* to analyze procedural due process claim but not for prisoner's substantive due process claim).

Lefkowitz v. Turley, 414 U.S. 70, 82 (1973) (holding that penalties include the loss of employment); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280, 283-85 (1968) (holding that discharge for invoking right against self-incrimination impaired Fifth Amendment privilege); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (holding that penalty of discharge for reliance on right to remain silent compelled policemen's incriminating testimony because it foreclosed a free choice to remain silent); *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977) (depriving attorney of position as an unpaid political party officer would "impinge on his right to participate in private, voluntary political associations").

The Fifth Amendment would have a different place in jurisprudence and history if its protections were potent only in the face of torture. *See infra*, Section III. This Court has explained that a "free and voluntary" statement "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)).

The State acknowledges that this Court has found Fifth Amendment violations even though torture and imprisonment were not involved, but it attempts to distinguish those cases by suggesting that its interests override those of Mr. Lile. This Court has rejected similar claims made by government officials. *See Turley*, 414 U.S. at 78 ("claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well").

In fact, in *Cunningham*, Chief Justice Burger, speaking for the Court, repeated the reasoning from *Turley* that the Fifth Amendment privilege against self-incrimination will rarely, if ever, yield to an overriding government interest:

> We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a government need. Government has a compelling interest in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in *Garrity*, *Gardner*, and *Sanitation Men*, where alternative methods of promoting state aims were no more apparent than here.

Cunningham, 431 U.S. at 803 (citations omitted).

The State suggests that because Mr. Lile is an inmate, this Court must review his Fifth Amendment claim under a lesser standard. However, the State's interest in *Mace v. Amestoy*, 765 F. Supp. 847 (D. Vt. 1991), identical to the one claimed here, did not fare well:

> [T]he state's rehabilitative purpose in compelling [Mace] to admit [his crimes] . . . is misplaced, because what is at issue is the disclosure, not the purpose of the disclosure. Certainly the state has a legitimate rehabilitative purpose in demanding full disclosure, but that does not make the disclosure any less incriminating.

Mace, 765 F. Supp. at 852.

If Mr. Lile's status as an inmate changes this Court's Fifth Amendment analysis, this Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987), aptly addresses this. The

State's concern that Mr. Lile's claims should be viewed differently because of his status as an inmate is handled ably by this Court's four-factored analysis set forth in *Turner*. *See infra*, Section IV.

C. A bright-line rule is impractical and unnecessary.

The State urges this Court to set a bright-line rule so prison officials may run their programs without fear of litigation. The State asks this Court to adopt a "liberty interest" standard from *Sandin* and apply it to self-incrimination claims in a prison.

The State criticizes the Tenth Circuit's ruling for adding unwanted "new layers" to *Sandin*. Pet. Brief 22. However, because *Sandin* involved a due process violation and Mr. Lile did not raise any due process claims, there cannot be any "new layers" added to *Sandin*. Moreover, a bright-line rule under which constitutional violations could not exist in prison absent a finding of a liberty interest contradicts *Sandin*. Again, even though the inmate had no liberty interest to support his due process claim, he would still be able to "invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate . . . ," and he could "draw upon internal prison grievance procedures and state judicial review where available." *Sandin*, 515 U.S. at 487 n.11 (1995).

Arguing that a liberty interest rule is especially appropriate when the sanctions imposed upon Mr. Lile are nonpunitive, the State forgets that its sanctions are

punitive.[7] Moving Mr. Lile to maximum security and Level I is punishment, and the State's witnesses concede that important fact. J.A. 91-92, 94, 96-97. The State also recognizes the high value inmates place on a preferred housing assignment in the prison, lending even further weight that a housing assignment can be coercive of an inmate's decision to waive his Fifth Amendment rights and enter into SATP. In a March 23, 1995, internal memorandum to all prisoners, Petitioner McKune wrote:

> Indeed, the Medium Facility has long been recognized as a preferred housing location for inmates with medium custody due in part to the nice gymnasium, open yard area, and the individual rooms within the pods K-L-M Units. It seems quite reasonable to expect that inmates who are responsible enough to live there to be responsible enough to participate in their program agreements and or program plans.

J.A. 83.

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[7] Allowing the State to determine whether its actions are "punitive" for considerations of the Fifth Amendment is self-serving, and this Court should look beyond such transparent labels. *See, e.g., Buise v. Hudkins*, 584 F.2d 223, 229 n.8 (7th Cir. 1978) ("The test for whether a transfer is sufficiently punitive would not be whether the prison officials deemed it punitive. Rather it would be an inquiry into, among other things, the relative conditions in the institutions and the harm of dislocation itself, and how the inmate perceived them."); *Carlo v. Gunter*, 520 F.2d 1293, 1294 (1st Cir. 1975) ("The fact that [the inmate's] transfer was denominated an administrative reclassification rather than a punitive transfer is of no moment where the impact on the inmate is the same.").

In *Kerr v. Farrey*, 95 F.3d 472, 479-80 (7th Cir. 1996), prison officials transferred an inmate from a minimum-security facility to a medium-security facility for refusing to participate in a Narcotics Anonymous ("NA") rehabilitation program. The Seventh Circuit ruled that "significant penalties" were meted out by the prison because the inmate raised First Amendment freedom of religion objections to the prison's NA program and refused to participate in the rehabilitative program:

> On the record as it comes to us, it is also undisputed that [the inmate] was subject to significant penalties if he refused to attend the NA meetings: *classification to a higher security risk category* and adverse notations in his prison record that could affect his chances for parole.

Kerr, 95 F.3d at 479 (emphasis added). The Seventh Circuit said that it "easily" found the State was "coercing" the inmate to enter into the rehabilitation program. *Id.* Mr. Lile is coerced no less by the State.

The State asks for a workable test to protect its ability to administer SATP and other prison programs.[8] This Court has provided such a framework in *Turner*. If the prison maintains a program that impinges upon constitutional rights, it may still operate that program "if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. This is the best approach to a

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[8] The State wrongly suggests that the Tenth Circuit's decision could undermine its ability to administer "other programs" in the prison. The State has never presented evidence that other prison programs like alcohol and narcotic rehabilitation or GED training require an admission of guilt or confession of uncharged offenses.

constitutional claim in the penal system. There are hundreds of prisons in the country and even more organized programs within those facilities. These programs have different goals and interests and will attempt to achieve those goals through different ways. There should be no "bright-line" or "one-size-fits-all" constitutional test here. The *Turner* analysis provides the flexibility needed for challenged prison regulations, while giving appropriate deference to prison officials.

II. The Prison Conditions in Question Constitute Compulsion.

A. Fifth Amendment case law does not support the State's position.

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), this Court determined that Ohio's clemency procedures for death row inmates did not violate the Fifth Amendment right against self-incrimination. In *Woodard*, an inmate sentenced to death in Ohio could request a clemency hearing 45 days prior to his scheduled date of execution. *Id.* at 276. Before that hearing, the inmate could meet with a parole board member for an interview. *Id.* at 277.

Mr. Woodard objected that the voluntary interview violated his Fifth Amendment rights because it did not permit him to bring counsel or grant him immunity for his statements. *Id.* at 285. This Court, though it assumed that parole officials would draw adverse inferences from his silence, ruled that this clemency interview was voluntary. *Id.* at 286.

> Here, respondent has the same choice of providing information to the Authority – at the risk of damaging his case for clemency or for post-conviction relief – or of remaining silent. But this pressure to speak in the hope of *improving his chance* of being granted clemency does not make the interview compelled.

Id. at 287-88 (emphasis added).

It was also important that Ohio was under no obligation to offer any such clemency review to death row inmates. Ohio's constitution "gives the Governor the power to grant clemency upon such conditions as he thinks proper." *Id.* at 276. If Ohio wanted to base clemency soley on what the governor and his advisor thought, the constitution would not be offended. That Ohio sought to do more – to extend a sizeable *benefit* to inmates – distinguishes *Woodard* from the present case.

In SATP, the State imposes penalties rather than offering benefits. Inmates who participate subject themselves to *additional* criminal charges and are kept in the same level and place in the prison. Those who do not participate are punished – sent to maximum security and dropped to Level I. *Woodard* cannot justify the sanctions imposed by the State for not participating in SATP.[9]

The State is stunned that the Tenth Circuit ruled SATP unconstitutional when this Court found no Fifth

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[9] If the State wants to rely on *Woodard*, it should make participation in SATP truly voluntary, without sanctions, and allow inmates to *better* their position in prison with promised benefits, not threatened punishments. *See infra*, Section IV.c.

Amendment violation in *Woodard* even though Mr. Woodard faced a loss of life. Pet. Brief 23-24. Undoubtedly, there can be no argument that suffering a transfer to maximum security and resultant sanctions pale in comparison to the loss of life. However, while this is a dramatic claim, the State ignores that Mr. Woodard would have received a possible benefit for participating in the clemency interview. The Tenth Circuit correctly noted that Mr. Woodard could *improve* his stay if he took part in the interview, and, even if he did not take part, clemency did not hinge on this refusal. Pet. App. 20a-21a. Mr. Lile receives no incentive to participate in SATP; instead, he is punished for invoking the Fifth Amendment.[10]

The Tenth Circuit also correctly distinguished *Minnesota v. Murphy*, 465 U.S. 420 (1984), finding that Mr. Murphy was not required to disclose incriminating information. Pet. App. 22a. In *Murphy*, this Court found no Fifth Amendment violation because Mr. Murphy never invoked his Fifth Amendment privilege against self-incrimination, but spoke freely:

> Thus it is that a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence must assert the privilege rather than answer if he desires not to incriminate himself. . . . [I]f he

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[10] Furthermore, Mr. Woodard, despite his unwillingness to participate in a clemency interview, was still considered for clemency through Ohio's clemency review process. *Woodard*, 523 U.S. at 276. In fact, at stake for Mr. Woodard was *not* the loss of his life, but rather, as this Court noted, the loss of the opportunity to "improve his chances of being granted clemency." *Id.* at 287-88.

> chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would *suffer no penalty* as a result of his decision to do so.

Id. at 429 (emphasis added).

The State argues that "atypical prison conditions" should be the touchstone of compulsion analysis, citing *Murphy* for its proposition that a "threat of revocation of parole" does not "amount to unconstitutional compulsion." Pet. Brief 12. The State, however, misreads *Murphy*, which held just the opposite:

> Our decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege. It is not surprising, then, that neither the State court nor any State officer has suggested otherwise. Indeed, in its brief in this Court, the State submits that it would not, and legally could not, revoke probation for refusing to answer questions calling for information that would incriminate in separate criminal proceedings.

Murphy, 465 U.S. at 438.

Mr. Murphy's situation was dramatically different than Mr. Lile's because Mr. Murphy never invoked his rights. In contrast, Mr. Lile invoked his rights, refused to sign the Admission of Guilt or to catalog his prior offenses, and chose to remain silent.

Similarly, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), Mr. Palmigiano was not punished solely for his refusal to testify at his disciplinary hearing. Instead, the disciplinary board merely weighed his silence against him:

> [A] prison inmate in Rhode Island electing to remain silent during his disciplinary hearing, as respondent Palmigiano did here, is not in consequence of his silence automatically found guilty of the infraction with which he has been charged. . . . It is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary board.

Id. at 317. The Tenth Circuit was correct in suggesting that Mr. Lile's claim was substantially different than Mr. Palmigiano's. Pet. App. 19a. Mr. Lile's refusal to provide incriminating information *automatically* results in a transfer to maximum security and other sanctions; there is no other possible result.

The State urges that it is not Mr. Lile's invocation alone that leads to transfer, but the fact that he is (1) a convicted sex offender (2) who should participate in SATP but (3) who refuses to give away his Fifth Amendment rights. It is this combination of factors that leads to sanctions. Pet. Brief 26. The reasoning is specious; one's status as a convicted sex offender would thereby subject the inmate to any and all recommended programs, no matter how awful their constitutional infirmities.

Furthermore, the State's notion that it punished Mr. Lile because of his refusal to participate in programming and not because he invoked his rights is not supported by the facts of this case. The State seeks the right to self-label its own conduct so that it can get around the constitutional violation. The Tenth Circuit rejected this argument.

Pet. App. 19a ("Plaintiff's *refusal to submit to the interrogation* – to disclose the required information about his sexual history – standing alone, would certainly result in the transfer to [maximum security] and the corresponding loss and restrictions of many privileges.") (emphasis added); Pet. Brief 20a (the State "would impose sanctions solely because Plaintiff wishes to remain silent and invoke his Fifth Amendment right against self-incrimination. . . . ").

The State's reliance on *McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997), is similarly misplaced. In *McMorrow*, the court found no violation because the law regarding Mr. McMorrow's claims was not clearly established at the time of the alleged violation; as a result, qualified immunity protected prison officials. *Id.* at 434, 436. Moreover, the court noted that Mr. McMorrow's complaint stated that he was being sanctioned for refusing to *admit guilt*, not because of his invocation of rights. *Id.* at 436.[11] In the present case, the State acknowledges that Mr. Lile's claims arise because he has invoked his Fifth Amendment rights. Pet. Brief 2.

Similarly, *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) is equally distinguishable. Mr. Asherman was not told or threatened at the time he asserted his Fifth Amendment right that he would lose his home release status if he refused to answer questions about his crime; a prison disciplinary board decided this only *after* he

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[11] Also in *McMorrow*, the sanctions imposed upon were truly *incentives*. Had he participated in SATP, he could have become eligible for work release and for "less restrictive confinement." *McMorrow*, 109 F.3d at 434.

refused to incriminate himself. *Id.* at 980-81. "In pursuing the inquiry, the Commissioner took no action to impair Asherman's self-incrimination privilege." *Id.* at 983. Unlike the state in *Asherman*, the State readily concedes that, for Mr. Lile, any refusal to answer incriminating questions during SATP will automatically result in losing his security level and will be moved to Level I.[12]

B. Courts analyze *ex post facto* and Fifth Amendment claims differently.

The *ex post facto* clause concerns laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). The State suggests that what is considered "punishment" under the *ex post facto* clause should also be considered punishment for purposes of the Fifth Amendment. Because Mr. Lile's sentence is not increased because of invoking his Fifth Amendment rights, the State suggests he has suffered no punishment.

The State relies upon *Kansas v. Hendricks*, 521 U.S. 346 (1997), in which this Court rejected both double jeopardy and *ex post facto* claims. In its analysis of Mr. Hendricks'

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[12] *Asherman* and *McMorrow* (as well as *Murphy*, *Baxter*, and *Woodard*) are further distinguishable from Mr. Lile's case because the sole issue in each was the requirement that they discuss *only* the underlying crime for which they had been convicted – not other past offenses that they had not been charged with. Because of the sexual offense history form in the SATP, Mr. Lile faces a far more incriminating situation and far more severe penalties of additional time to serve if the State prosecutes him for any uncharged offenses listed on his sexual history form.

double jeopardy claim, this Court noted that the Double Jeopardy Clause prohibits the state from "punishing twice, or attempting a second time to punish criminally, for the same offense." *Id.* at 369 (citing to *Witte v. United States*, 515 U.S. 389, 396 (1995)). This Court rejected Mr. Hendricks' double jeopardy claim, because the civil commitment proceedings did not amount to a second prosecution; as a result, there could be no second punishment or possibility for additional criminal time. *Id.* at 369-70. Having determined there was no additional prosecution or punishment possible, this Court dismissed the *ex post facto* claim. *Id.* at 370-71; *see also Seling v. Young*, 531 U.S. 250 (2001) (rejecting inmate's double jeopardy and *ex post facto* claims regarding Washington's sexually violent predator statute).

The State concludes, apparently, that so long as an inmate's sentence is not extended, there can be no "punishment." Accordingly, the State believes it may change the nature of the prisoner's confinement with impunity once he invokes his Fifth Amendment rights. All it may not do is keep him in prison for a longer period of time.

Yet, this Court has never held that a prisoner's Fifth Amendment rights are so circumscribed,[13] and the cases

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[13] This Court in *Murphy* specifically noted that a person's Fifth Amendment rights are not affected by the fact he is in prison:

> A defendant does not lose this protection by reason of his conviction of a crime; *notwithstanding that a defendant is imprisoned or on probation at the time he makes the incriminating statements*, if those statements are compelled they are inadmissible in a subsequent

that the State cites do not support this reading of the Fifth Amendment. The court in *Reed v. McKune*, No. 98-3418, 2000 WL 1278488, at *7-8 (D. Kan. July 17, 2000), rejected the inmate's *ex post facto* and Fifth Amendment challenges to SATP. It did not, however, dismiss the inmate's Fifth Amendment claim under the theory that what is punishment for the *ex post facto* clause is punishment for Fifth Amendment claims. *Id.*

Similarly, in *Neal v. Shimoda*, 131 F.3d 818, 827 (9th Cir. 1997), the Ninth Circuit, relying upon *Hendricks*, found no *ex post facto* violation regarding Hawaii's sex offender treatment program. The court also rejected plaintiffs' Fifth Amendment claim, but not because the inmates faced no possibility of additional time in prison as a result of their invocation. *Id.* at 833. There was no Fifth Amendment claim, the court ruled, because the state conceded that no incriminating statements could be used against the inmates in a future criminal proceeding, nor were the inmates required to admit unreported crimes. *Id.* at 833 & n.18. Similarly, in *Brooker v. Warden*, No. 98-466, 1999 WL 813893 (D.N.H. June 22, 1999), the court rejected the inmate's *ex post facto* and Fifth Amendment claims, but did so for different reasons, not because it considered additional prison time the barometer for the claims.[14]

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trial for a crime other than that for which he has been convicted.

465 U.S. at 426 (emphasis added).

[14] Indeed, the court's analysis in *Brooker* supports Mr. Lile's claim here. Mr. Brooker took part in sex offender treatment in the hope that he would *reduce* his security status and increase his chances for parole. The court found that this did not amount to a Fifth Amendment violation. *Brooker*, 1999 WL 813893, at *5

Just as the State asks for a bright-line rule based upon a liberty interest analysis, it once again asks for another rule that says "punishment" can only take but one form – additional time served. Whether it be through a liberty interest or *ex post facto* analysis, the State's insistence on a bright-line rule for Fifth Amendment claims is troublesome. If the Court adopts such a rule in this case, it may encourage the State to pursue incriminating information from any inmate it chooses.

Working from its belief that an admission of guilt is beneficial to an inmate's rehabilitation, the State could begin asking other inmates to admit they committed the crime for which they are in prison as well as all other reported crimes. For example, the State could require all those inmates who committed a violent crime to enroll in an anger management class. Part of the class would require admissions such as the State seeks here. If the inmates do not participate, the State could punish them in any fashion short of an atypical hardship or increased prison time.

Mr. Lile agrees that the penalties at issue will not extend his time in prison. Neither will they affect his eligibility for parole. However, there is nothing in this Court's decisions, and none in those decisions cited by the State, that suggests that what is punishment for *ex post facto* claims should be the same as a penalty under the Fifth Amendment.

("Offering the possibility of earning a benefit is certainly an incentive to participate, but it is not coercion. In other words, the possibility of parole is a carrot, not a stick.").

III. The Tenth Circuit's Decision is Consistent with the History and Origins of the Fifth Amendment.

The State's argument that the Tenth Circuit's decision does not comport with the history and origins of the Fifth Amendment is baseless. Under its view, only those punishments akin to "incarceration, banishment, or mutilation" would constitute impermissible compulsion. Pet. Brief 30-31. Contrary to the State's position, "[t]he roots of the privilege are deeper than the rack and the screw used to extort confessions. They go to the nature of a free man and to his relationship to the state." *United States v. Wade*, 388 U.S. 218, 261 (1967) (Fortas, J., concurring in part and dissenting in part). Indeed, this Court noted in *Ullmann v. United States*, 350 U.S. 422 (1956), that the privilege against self-incrimination "was aimed at a more far-reaching evil – a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Id.* at 427-28.

Courts routinely apply the Fifth Amendment to punishments of all varieties. As this Court noted in *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977), "the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids."

The privilege serves many important purposes:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964) (citations omitted).

This Court unhesitatingly applies the privilege against self-incrimination to compulsions likely deemed trifling in a day of banishment or mutilation. In *Spevack v. Klein*, 385 U.S. 511 (1967), for example, this Court determined that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood" constituted compulsion sufficient to uphold the invocation of the Fifth Amendment. *Id.* at 516. *See also Lees v. United States*, 150 U.S. 476, 480-81 (1893) (applying Fifth Amendment privilege against self-incrimination to $1,000 penalty for importation of illegal aliens).

To Mr. Lile, the sanctions threatened by the State make the assertion of his privilege costly. A Fifth Amendment that protects only against dismemberment or banishment is of little present value to our democracy.

IV. The Factors Set Forth in *Turner v. Safley* Offer the Best Test of Deference and Reinforce the Unconstitutionality of SATP.

Mr. Lile agrees that prison officials, faced with managing the most difficult section of society, deserve some deference in the decisions they make and programs they

conduct. Mr. Lile also agrees that *Turner v. Safley*, 482 U.S. 78 (1987), creates a unique standard of review for constitutional violations relating to rehabilitative prison programming. However, it is unclear what level of deferential review the State would like this Court to employ when reviewing the constitutional claims of inmates.

A. Application of *Turner*.

When the State argues that *Turner* makes sense only when dealing with prison regulations affecting the First Amendment, Pet. Brief 36, the State overlooks the following pronouncement of this Court:

> Our earlier determination to adopt this standard of review was based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. . . . We made quite clear that the standard of review we adopted in *Turner* applies to *all circumstances* in which the needs of prison administration implicate constitutional rights.

Washington v. Harper, 494 U.S. 210, 223-24 (1990) (emphasis added).

Mr. Lile agrees with the State that this Court has never ruled that the application of *factors* from *Turner* is required to determine whether a state's program is reasonably related to its avowed interest in rehabilitation. This Court has suggested, however, that what *Turner* did,

in part, was "identify several factors relevant to this reasonableness determination." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987); *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) ("The Court in *Turner* identified several factors that are relevant to, and that serve to channel, the reasonableness inquiry."). As each case involving the constitutionality of prison regulations is typically fact-specific, it makes sense to turn to the *Turner* factors to determine whether the questioned regulation meets the standard of reasonableness. *See Shaw v. Murphy*, 121 S. Ct. 1475, 1479 (2001) (noting that, when employing *Turner*, "courts should consider" the *Turner* factors). *Id.*[15]

B. Timing of the *Turner* Application.

The State suggests that the Tenth Circuit erred in applying *Turner* only upon finding a constitutional violation. Pet. Brief 37-38. Instead, it argues the Tenth Circuit should have considered the issue of deference while determining whether Mr. Lile's rights were violated. The specific language of *Turner* suggests otherwise: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Thus, the Tenth Circuit's approach of finding the constitutional violation before employing *Turner* appears

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[15] This Court's decision in *Shaw* does not, however, entirely resolve the issue of what claims merit *Turner* review. While noting that the *Turner* analysis applies to constitutional claims, this Court also stated that *Turner* provided "the test for evaluating prisoners' First Amendment challenges,. . . . " *Shaw*, 121 S. Ct. at 1479.

appropriate. *See also Boyd v. Petsock*, 795 F. Supp. 743, 745 n.5 (W.D. Pa. 1992) ("*Turner* presupposes a constitutional violation and judges the validity of a regulation which has already been found violative of a prisoner's constitutional rights.").[16]

C. Application of the *Turner* Factors.

1. There is a rational connection between SATP and interests in therapy.[17]

The Tenth Circuit correctly noted that there is a rational connection between SATP and the State's interest in treating sex offenders. However, there is nothing to suggest, as the State does, that the Tenth Circuit failed to give this factor sufficient weight.[18] The State would like the *Turner* analysis to end at this point. It does not. The *Turner* analysis does not end once a court finds in favor of

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[16] In its brief, the State seems to suggest that *Turner* should not be applied *until* a Fifth Amendment violation is found: "Nor, absent any Fifth Amendment violation, is there any reason to engage in a balancing of interests under *Turner*. . . ." Pet. Brief 12.

[17] The State sets forth the factors from *Turner* at page 35 of its brief.

[18] Mr. Lile's claim of innocence presents a dilemma. No one would contest the State's repeated position that an admission of responsibility for a crime makes therapy easier to accomplish. However, it is unclear what the State's position is on therapy if the inmate is innocent. Acknowledging the cliché that there are no guilty inmates, Mr. Lile nevertheless maintains the crimes for which he was convicted were the result of consensual sexual activity. The State has not addressed how its arguments and analysis might change if Mr. Lile *cannot*, as opposed to *will not*, accept responsibility for the crimes for which he was convicted.

the state on this first factor. Indeed, had the Tenth Circuit found in favor of Mr. Lile on this factor, it could have ended the *Turner* analysis. *See Shaw v. Murphy*, 121 S. Ct. 1475, 1479 (2001) ("If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor."). There is nothing to suggest that the converse is true.

It remains unclear how notions of deterrence mesh with the State's interest in rehabilitation. Attorneys General Amicus Brief at 11. It is true that deterrence is an important function of the penal system, but it is unclear how additional punishment for inmates will advance therapeutic goals.

2. There are no other ways for Mr. Lile to exercise his Fifth Amendment rights.

Mr. Lile cannot both participate in SATP and preserve his Fifth Amendment rights. The manner in which SATP is structured prevents this. The states' attorneys general suggest that this factor favors the State because Mr. Lile is not being compelled to incriminate himself. Because SATP is a "voluntary" program, they argue, he has the option of not participating in SATP. At the outset, the argument is circular. According to the states' attorneys general, Mr. Lile has the "voluntary" choice not to participate, and thus exercises his right to remain silent. Unfortunately, the states' attorneys general ignore the fact that the State punishes this so-called "voluntary choice" with transfer to maximum security.

The states' attorneys general do not address a fundamental question of this *Turner* factor: whether there are other ways for Mr. Lile to exercise his Fifth Amendment rights *while* participating in SATP. *Turner*, 482 U.S. at 90 (noting that the issue is whether there are "other avenues" available to the inmate to express his rights while complying with the questioned programming). Because the State will neither permit immunity nor modify its program and treat without forcing an admission of guilt, the answer is "no."

3. There will be little impact to the State if it accommodates Mr. Lile's rights.

Immunity will not adversely affect the operation of SATP, but would likely improve it. Accommodating Mr. Lile's rights (and the Fifth Amendment rights of others) will actually *increase* the chance that more inmates will become rehabilitated. Without the fear of incriminating themselves, more inmates will be inclined to be forthcoming about their sexual offenses. If the State desires "meaningful participation," *see* Pet. Brief at 11-12, then providing immunity better serves their asserted goals.

The states' attorneys general suggest that because other inmates would not be given the same protection, tensions may increase at the prison. However, other inmates are not faced with the same choice: surrender the Fifth Amendment or be dispatched to maximum security confinement and Level I status. If the State chooses to compel incriminating information from other prisoners, it can provide them the same protection – and ward off the chaos.

4. There are workable alternatives for the State to consider.

The State repeats that its main goal is to provide therapy for sex offenders. Mr. Lile agrees that sex offenders would benefit from treatment. However, when presented with a manageable way to secure the therapy it seeks, the State balks.

It is incorrect to suggest that immunity provides a sex offender blanket protection from future prosecution. Immunity will limit the State's ability to prosecute a sex offender for a past crime, but will not preclude it. As this Court noted in *Kastigar v. United States*:

> The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.' " Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection.

406 U.S. 441, 453 (1972) (quoting *Ullman v. United States*, 350 U.S. 422, 438-39 (1956)). The State could prosecute Mr. Lile, but could not use the "compelled testimony or its fruits" in any subsequent criminal prosecution against him. *See Gardner v. Broderick*, 392 U.S. 273, 276 (1968).[19]

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[19] Immunized disclosures would also equip the State with a powerful way to make sure that such inmates are not permitted to avoid responsibility for their past crimes. If an inmate – even one given immunity – admitted past uncharged sex offenses, the State could use these against the inmate in a civil commitment

Another alternative the State can use at a *de minimis* cost to SATP is to turn the State's sanctions into benefits. The State could maintain SATP – without providing immunity – if it placed newly-convicted sex offenders in maximum security upon arrival to prison. Then, SATP would operate as a true incentive program. If Mr. Lile wanted out of maximum security, the State would allow him to do so only upon *full* participation in SATP. If not, he would remain in maximum security. This would be in keeping with the philosophy that Mr. Lile should not suffer "any sanction" for invoking his Fifth Amendment rights. *Spevack v. Klein*, 385 U.S. 511, 515 (1967); *see also McMorrow v. Little*, 109 F.3d 432, 434 (1997) (discussing treatment program that gave incentives of work release and "less restrictive confinement" as inducements to participate).[20] If the State cannot strip Mr. Lile of anything, the State would not be sanctioning him for exercising his Fifth Amendment rights. *See also infra*, Section V.

V. The State's Interests Do Not Warrant Denying Mr. Lile His Fifth Amendment Rights.

The State's concern that Mr. Lile will be unfairly occupying the bed of an inmate who wants to participate

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hearing under the Kansas Sexual Predator Act. *See* Kan. Stat. Ann. 59-29a01 *et seq.* (1999). Such admissions would be a powerful tool for the State to keep dangerous or repeat sex offenders away from society and to continue to provide further rehabilitation.

[20] Similarly, the State could offer sex offenders in medium security a chance to get to minimum security or could award good-time credits for those who complete SATP.

unconditionally in SATP will not exist if this Court affirms the Tenth Circuit decision. If this Court affirms, Mr. Lile *will* participate unconditionally in SATP. He will make any admission requested by the State. He will participate in frank group therapy discussions. His participation in the program will be no different than any other inmate taking part in SATP. *The operation of SATP will remain unchanged*. Furthermore, the State can prosecute Mr. Lile for past crimes notwithstanding immunity,[21] it can use his admissions in civil commitment hearings, and it can punish him if he still refuses to participate in SATP. *See supra*, Section IV.

The State minimizes the grave consequences of providing incriminating information during SATP. Although the State apparently has yet to bring charges against anyone from information obtained in SATP, it has made clear that it will indeed forward information about prosecutable offenses to the authorities. Pet. App. 7a. That prosecution has not happened in Kansas does not mean it cannot happen.

Certainly, other states have used incriminating statements from their sex offender treatment programs to bring *additional* charges against those undergoing treatment. *See, e.g., Montana v. Fuller*, 915 P.2d 809, 811 (Mont.

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[21] It is misplaced to suggest, as the State does, that prosecution for Mr. Lile's past crimes is unlikely based upon statute of limitation issues. Pet. Brief 41 n.12. There is no statute of limitation for murder. *See* Kan. Stat. Ann. 21-3106(1) (2000). Moreover, the State would have two years from the time Mr. Lile admitted a sexual offense to prosecute if he took any affirmative steps to conceal the crime *See* Kan. Stat. Ann. 21-3106(8)(c) (2000).

1996) (noting that the state prosecuted defendant for two counts of sexual assault and one count of rape after presenting information on his sexual history during sex offender treatment program); *Vermont v. Cate*, 683 A.2d 1010, 1018 (Vt. 1996) (noting that the prosecutor stated at oral argument that he would charge defendant with perjury if he signed the admission of responsibility form used in state's sex offender treatment program); *Oregon v. Tenbusch*, 886 P.2d 1077 (Or. Ct. App. 1994) (prosecuting defendant for two counts of sexual abuse based on statements made during a polygraph test used in his sex abuse treatment program).

The State has a number of options and need not abandon its rehabilitative programs. As the Tenth Circuit noted – and as several other courts addressing this issue have noted – the State could provide immunity for incriminating statements made during SATP. Pet. App. 30a (calling this option "the most obvious and easy alternative to the challenged policy," and noting that some states already attach the privilege to such statements through statutes); *see also Mace v. Amestoy*, 765 F. Supp. 847, 851-52 (D. Vt. 1991); *Cate*, 683 A.2d at 1019.[22]

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[22] Two cases cited by the State in its Petition for Certiorari for the proposition that there is no Fifth Amendment violation here actually support the concept of immunity or confidentiality. *Tedder v. Francke*, 931 F.2d 897, 1991 WL 65497, at **2 (9th Cir. Apr. 24, 1991) ("An inmate patient's disclosures to a treating therapist are unavailable to the state or federal government to use in a court proceeding. If he chose to undergo the treatment, [plaintiff] would not be providing the state with incriminating evidence."); *Guilkey v. Holden*, 865 F.2d 258, 1988 WL 134526, at **1 (6th Cir. Dec. 16, 1988) (dismissing plaintiff's Fifth Amendment claim because "plaintiff's admission would

Alternatively, the State could make SATP truly voluntary, without any penalties or sanctions for invoking Fifth Amendment rights, premising participation upon a system of benefits. In reviewing a Fifth Amendment challenge regarding guilty pleas, this Court noted in *Brady v. United States*, 397 U.S. 742 (1970):

> We cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

Id. at 753.[23]

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be a privileged communication not subject to disclosure in any civil or criminal proceeding"). *See also* Ky. Rev. Stat. Ann. § 197.440 (2000) ("Communications made in the application for or in the course of a sexual offender's diagnosis and treatment in the program between a sexual offender or member of the offender's family and any employee of the department who is assigned to work in the program, . . . shall be privileged from disclosure in any civil or criminal proceeding, . . . ").

[23] The United States, in its amicus brief, is wary that a ruling from this Court upholding the decision of the Tenth Circuit will harm its federal sex offender treatment program. United States' Brief 26-27. It will not. The Federal Bureau of Prisons' program is truly voluntary. If inmates do not want to participate in the program, nothing happens to them. *Id.* If they decide to participate, they are transferred to a facility in North Carolina for treatment. *Id.* If officials subsequently remove them from the program, the inmates return to their previous facility. *Id.* As a result, prison officials do not make an inmate's situation

Similarly, as the Federal Sentencing Guidelines provide, if defendants "acknowledge their responsibility" for their crimes, they can receive a lesser sentence (i.e., they can earn a reward or receive a benefit as opposed to suffering a punishment or penalty). The Second Circuit, in analyzing whether the Sentencing Guidelines Section 3E1.1 violated the Fifth Amendment, noted that "one of the goals of sentencing is rehabilitation, and a defendant's admission of responsibility or expression of contrition 'is often a significant first step towards his rehabilitation and, for that reason, deserving of a possible *reward* in the form of a lessened sentence.' " *United States v. Parker*, 903 F.2d 91, 105 (2d Cir. 1990) (quoting *Smith v. Wainwright*, 664 F.2d 1194, 1996 (11th Cir. 1981)) (emphasis added).

When considering the Federal Sentencing Guideline's provision of a lesser sentence for admitting responsibility for a crime, the Tenth Circuit noted the difference between a "penalty" for invoking one's Fifth Amendment rights versus a "reward":

> [T]he denial of a downward adjustment under § 3E1.1 does not constitute a penalty or an enhancement of a sentence. There is a difference between increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed base offense level. "It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to

in the prison system worse if he refuses to participate in treatment.

> administer additional punishment to a defendant who by his silence has committed no additional offense."

United States v. Rogers, 921 F.2d 975, 982-83 (10th Cir. 1990) (quoting *United States v. Stratton*, 820 F.2d 562, 564 (2d Cir. 1987)).[24]

The rehabilitation of sex offenders is an important goal. However, it need not and should not come at a high constitutional price. SATP is unconstitutional; it violates Mr. Lile's Fifth Amendment right against self-incrimination. But, it is easily repaired. If the State will grant immunity to its participants, it may continue its rehabilitative program and continue its ability to commit and prosecute those involved with sexual offenses. Constitutional rights can thereby coexist with the State's goals of therapy and deterrence. They need not be in conflict.

As this Court recently reiterated in *Mitchell v. United States*, 526 U.S. 314, 329 (1999), "the central purpose of the privilege – to protect a defendant from being the unwilling instrument of his or her own condemnation – remains of vital importance." Here, Mr. Lile will be the "unwilling instrument of his own condemnation" if this Court allows the State to force him into SATP.

[24] This Court has recognized that there are distinct differences between granting benefits like parole versus revoking parole. " '[T]here is a human difference between losing what one has and not getting what one wants.' " *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 10 (1979) (quoting Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1975)).

CONCLUSION

Mr. Lile respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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August 2001

JUL 12 2001

No. 00-1187

In the Supreme Court of the United States

DAVID R. MCKUNE, WARDEN, ET AL.,
PETITIONERS

v.

ROBERT G. LILE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination prevents a State from encouraging incarcerated sexual offenders to participate in a clinical rehabilitative program, in which participants must accept responsibility for their offenses, by conditioning the availability of certain institutional privileges on participation in the program.

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INTEREST OF THE UNITED STATES

The court of appeals in this case held that the Self Incrimination Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, prevents a State from seeking to advance legitimate penological objectives by conditioning the availability of certain institutional privileges on convicted sexual offenders' participation in a clinical rehabilitative program in which participants must accept responsibility for their sexual offenses. The Federal Bureau of Prisons (BOP), which operates more than 90 penal institutions across the country, has its own sexual offender treatment program. Like the state program challenged in this case, the overriding objective of the federal program is "to help sexual offenders manage their sexual deviance in

order to reduce sexual recidivism." U.S. Dep't of Justice, Bureau of Prisons, *Sex Offender Treatment Program* 1 (2001) (*Program Description*). As we explain below, although the federal program differs in important respects from the state program here, it shares the critical treatment goal of having inmates demonstrate "[c]omplete acceptance of responsibility for [their] sexual crime(s)." *Id.* at 2. The United States has a strong interest in establishing the validity of such treatment programs and, more generally, in ensuring that prison officials have appropriate discretion in seeking to advance legitimate penological goals such as reducing sexual recidivism.

STATEMENT

1. Sexual offenders inflict a terrible toll each year on this Nation and its citizens. In 1995, nearly 355,000 rapes and sexual assaults were reported nationwide by victims older than 12 years. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* (1997); see also U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* 24 (1999).[1] Between 1980 and 1994, the average number of individuals imprisoned for sexual offenses increased at a faster rate than that for any other category of violent crime. *Sex Offenses and Offenders* 18. In 1994, nearly 100,000 inmates were serving time in state prisons for rape or sexual assault; another 134,000 convicted sexual offenders were under community supervision, such as probation or parole. *Id.* at 15. More than 42,000 of those inmates victimized children. U.S. Dep't of Justice, Bureau of Justice Statistics, *Child Victimizers: Violent Offenders and Their Victims* 2 (1996).

[1] These figures understate the incidence of sexual offenses because many sexual offenses go unreported and others involve children under the age of 12, who are not covered by this survey.

When they reenter society at large, convicted sexual offenders are much more likely to repeat the offense of conviction than any other type of felon. *Sex Offenses and Offenders* 27; U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* 6 (1997). At the same time, however, it is widely accepted by correctional officials and therapists alike that clinical rehabilitative programs can enable sexual offenders to manage their criminal sexual impulses and thereby reduce the risk of sexual recidivism. U.S. Dep't of Justice, Nat'l Institute of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* xiii (1988) (*Practitioner's Guide*).[2] A vital component of those programs is for participants to come to terms with their sexual misconduct. *Id.* at 73.

2. a. Like most States and the federal government, Kansas has established a sexual abuse treatment program (SATP) for convicted sexual offenders as a means of enabling such inmates "to control deviant behavior and reduce [the risk of] reoffending" behavior. 4 Kansas Dep't of Corrections, *Offender Programs Evaluation* 31 (2000); J.A. 99. The Kansas SATP utilizes a number of generally accepted treatment techniques, including individual and group counseling, as well as polygraph and penile plethysmograph testing. See *Practitioner's Guide* 219-224 (discussing model treatment programs from more than 20 States). A critical treatment goal of the Kansas program—like that of virtually every other successful program—is for participants to accept

[2] "[T]he rate of recidivism of treated sexual offenders is fairly consistently estimated to be around 15%," whereas the rate of recidivism for untreated offenders has been estimated to be as high as 80%. *Practitioner's Guide* xiii. "Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals." *Ibid.*; see also, *e.g.*, *The Sexual Predator: Law, Policy, Evaluation and Treatment* 11-25 (Anita Schlank & Fred Cohen eds., 1999) ("[I]t seems generally recognized * * * that given an appropriate treatment regimen, many sexual offenders do respond positively.").

responsibility for their offenses. J.A. 100, 107. To that end, participants must complete an "Admission of Responsibility" form (J.A. 31), fill out a sexual history form discussing offending behavior (J.A. 32-34), and discuss their past sexual behavior in individual and group counseling sessions.

SATP staff generally keep such information confidential. However, inmates are informed before entering the program that confidentiality is limited. J.A. 35-36. In particular, SATP counselors must report any incidents of child abuse, as well as "situations which could be harmful to [the inmate] or others, or a threat to the orderly operation of the facility." J.A. 35. SATP staff also provide treatment evaluations of participants to the Kansas Parole Board, and SATP records may be subpoenaed. *Ibid.* We understand that no SATP participant has ever been charged with (or convicted of) a criminal offense based on information disclosed during treatment, but an inmate's participation in the program nonetheless could result in the disclosure of potentially incriminating information.[3]

b. Correctional officials recommend convicted sexual offenders who meet certain criteria for participation in the SATP. Those inmates are advised that the SATP is "voluntary," and that participants must sign a consent form before enrolling. J.A. 31; Pet. App. 20a. Nevertheless, prison officials encourage participation in the SATP, just like other prison programs, to advance their penological objectives. Pet. App. 27a; J.A. 100.

As an overall means of "managing the offender population and reinforcing constructive behavioral changes in offenders," the State's Internal Management Policy and Procedure (IMPP) for prisons establishes "a comprehensive system of earnable offender privileges," including those governing TV ownership, inmate organizations and activities, canteen expenditures, property, incentive pay, and visitation. J.A. 13-14. The IMPP establishes certain incentive levels—Intake Level, Level I, Level II, and Level III—that reward inmates who meet correctional goals by granting them additional privileges. J.A. 14-15, 27, 52. Although applicable regulations state that an "inmate shall not be penalized for refusal to participate in a formal program plan," Kan. Admin. Regs. § 44-5-105(c)(1), an inmate's decision not to participate in a recommended program, including the SATP, results in a reduction in his incentive level and, thus, in his privileges. J.A. 19, 73-74.

Declining to participate in the SATP may also affect where an inmate is housed. Kansas operates minimum, medium, and maximum security facilities. An inmate may not be housed in a facility with a security designation below his custody level, but may be housed in a facility with a security designation above that level. J.A. 60, 62; see J.A. 103-104 ("There are probably hundreds of medium security inmates today, and probably a good number of minimum security—or custody inmates, that are living in maximum security settings today."). Prison officials do not base housing decisions on the IMPP's incentive system, but instead rely, *inter alia*, on an inmate's custody level, the availability of space in a particular facility, and whether an inmate is enrolled in a program or has a job in a facility. J.A. 62-63, 68, 70-71, 99.

The SATP is conducted at only a few facilities in Kansas, including at the medium-security facility in Lansing. An inmate's refusal to participate in the SATP may result in his transfer from a facility that hosts the program to another facility, consistent with his custody level. J.A. 83. As the Secretary of Corrections has explained, "it makes no sense to have someone who's not participating in a program taking

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[3] Information about sexual offenses other than the offense of conviction may come up during counseling, but SATP staff do not view it as their role to "investigate" such offenses and, thus, try to use identifiers for prior victims other than their full names. J.A. 154; see J.A. 109-112, 154-155.

up a bed in a setting where someone else who may be willing to participate in a program could occupy that bed and participate in a program." J.A. 99.

3. In 1982, respondent flagged down a high school girl and forced her at gunpoint to commit oral sodomy on him, then drove her to a field and raped her. He was convicted of rape, aggravated sodomy, and aggravated kidnaping, and sentenced to life imprisonment with the possibility of parole after 15 years. *Kansas* v. *Lile*, 699 P.2d 456, 457 (Kan. 1985). Respondent was assigned a medium-custody level and imprisoned in the maximum-security facility in Lansing, along with other medium-custody inmates. In 1989, he was transferred to the medium-security facility in Lansing. In 1994, prison officials recommended that respondent participate in the SATP at that facility, but he declined to do so. Pet. App. 4a.

Under the IMPP, respondent's decision not to enroll in the SATP reduced his incentive level from Level III to Level I and, thus, diminished his privileges. Pet. App. 10a. At Level III, respondent could, *inter alia*, purchase his own personal TV; participate in approved organizations or activities; receive any approved visitor; and spend $140 per payroll period in the canteen. At Level I, he remains eligible for general TV viewing; may participate in certain self-help programs and enjoy library and religious services and gym and yard activities; may receive visits from immediate family members, attorneys, and clergy; and may spend up to $20 per payroll period. See J.A. 27 (chart).

Although he retained his medium-custody level, respondent received notice that he would be transferred from Lansing's medium-security facility—where the SATP is conducted—to its maximum-security facility, where he would be housed in the C-2 unit with other medium-custody inmates. Pet. App. 17a; J.A. 73. The conditions in C-2 are less favorable than those at the medium-security facility. For example, more inmates share a cell in C-2; it has inferior

athletic facilities; and C-2 inmates enjoy less flexibility than inmates in the medium-security facility, who, for example, have keys to their dormitory-style cells. J.A. 64-68; C.A. App. 47-48. In addition, respondent asserts that the potential for violence is greater in the C-2 unit, though prison officials dispute that contention. See J.A. 78-79.

4. In 1995, respondent filed this action, claiming that prison officials violated his Fifth Amendment privilege against compelled self-incrimination by reducing his privileges and noticing his transfer for not participating in the SATP.[4] The district court found that the SATP is a genuine "clinical rehabilitative program," supported by a "legitimate penological objective"—rehabilitation. Pet. App. 52a. In addition, the court acknowledged that respondent's refusal to participate in the program may not result in any "*atypical* [prison] hardship." *Id.* at 43a. Nonetheless, the court held that "the hardship attendant to [respondent's] refusal to participate in the SATP Program is sufficient compulsion for purposes of the Fifth Amendment," and granted summary judgment for respondent. *Id.* at 44a.

The court of appeals affirmed. Pet. App. 1a-32a. The court held that the consequences flowing from respondent's refusal to participate in the SATP "are sufficiently potent and substantial to constitute impermissible compulsion" under the Fifth Amendment. *Id.* at 26a. In so holding, the court reasoned that in the prison context unconstitutional "[c]ompulsion can be established by hardships that may not be atypical and that do not constitute enforceable liberty interests." *Id.* at 15a. Because it found impermissible com-

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[4] Respondent also claimed that the SATP violated his constitutional "right to privacy and bodily integrity" by requiring him to submit to a plethysmograph examination. Pet. App. 46a. The court of appeals did not consider the merits of that claim, and that issue is not before this Court. *Id.* at 32a.

pulsion, the court rejected the proposition that the SATP was "truly voluntary." *Id.* at 20a.

The court also considered respondent's claim under the inquiry established by *Turner* v. *Safley*, 482 U.S. 78 (1987). The court agreed with Kansas that the SATP served legitimate penological interests—"promoting rehabilitation and increasing public safety"—and recognized that requiring inmates to accept responsibility for their offenses advanced those interests, as "most mental health experts agree that 'a sex offender must admit his guilt for treatment and rehabilitation to be successful.'" Pet. App. 27a-28a. Nevertheless, the court concluded that "the *Turner* balancing weighs in favor of the inmate," reasoning that the State could achieve its objectives "by implementing a system of confidentiality or granting immunity." *Id.* at 32a.

SUMMARY OF ARGUMENT

Kansas encourages incarcerated sexual offenders to participate in a sexual abuse treatment program by conditioning the availability of certain privileges upon an inmate's agreement to participate. The program recognizes that successful treatment requires participants to come to terms with their past history of sexual misconduct. Although counselors seek that information to facilitate treatment, in some instances, counseling sessions may elicit information about past sexual history that indicates a current risk to the safety of children or other inmates. Kansas warns program participants that such information will not necessarily remain confidential. Nothing in the Self Incrimination Clause precludes Kansas from adopting, or encouraging inmates to participate in, this common-sense rehabilitative program.

The privilege against self-incrimination does not terminate with incarceration. Nonetheless, the fact of incarceration and the resulting restrictions on an inmate's liberty clearly inform the Fifth Amendment analysis. In the due

process context, this Court recognizes that the elimination of privileges and minor changes in incarceration status do not implicate constitutional liberty interests. *E.g.*, *Sandin* v. *Conner*, 515 U.S. 472 (1995). Those same principles support the proposition that, absent arbitrary state action, the minor changes in detention status at issue here do not result in unconstitutional compulsion. The court below reached a different conclusion by relying on cases that prohibit the government from penalizing the assertion of a Fifth Amendment privilege by loss of public employment or contracts. But this Court has never applied those so-called "penalty" cases in the prison context, and with good reason. The granting and withdrawing of privileges to which inmates have no entitlement does not create the same kind of compulsion as the penalties discussed in this Court's precedents. Moreover, the court of appeals lost sight of the basic point that what constitutes impermissible "compulsion" must take account of the significant restrictions already inherent in any sound penal regime.

Even if Kansas' treatment program implicates the Fifth Amendment rights of inmates, it does not violate the Constitution because any burdens on those rights are reasonably related to legitimate penological interests. See *Turner* v. *Safley*, 482 U.S. 78 (1987). Kansas' interest in reducing recidivism among convicted sexual offenders is unassailably legitimate. The treatment program advances that interest directly because it is almost universally acknowledged that accepting responsibility for past sexual misconduct is necessary for successful treatment. By providing incentives for inmates to participate, prison officials further the interests of other inmates, the facility, and society as a whole. Although not questioning those interests, the court of appeals held that the Kansas program was unconstitutional by reasoning that the State could achieve those objectives, without implicating inmates' constitutional rights, by the simple expedient of immunization. But decisions concerning the

scope of confidentiality in the prison rehabilitative setting are no less deserving of deference than other difficult judgments that correctional officials must make. Moreover, the limits that Kansas has placed on confidentiality, including those requiring counselors to report information concerning child abuse or the safety of inmates, clearly promote legitimate penological objectives.

Finally, if this Court concludes that the Kansas program is unconstitutional, it should do so on grounds that do not cast doubt on the validity of other treatment programs, including the federal program. Although there is almost universal agreement that acceptance of responsibility is key to successful treatment of sexual offenders, there are a variety of ways to contour such a treatment program. BOP has chosen not to condition the availability of privileges on inmates' agreement to participate in its treatment program. Even if the Court concludes that the Kansas program is invalid, it should leave room for the operation of a treatment program like the federal one.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT PREVENT A STATE FROM ADVANCING LEGITIMATE PENOLOGICAL OBJECTIVES BY CONDITIONING THE AVAILABILITY OF INSTITUTIONAL PRIVILEGES ON PARTICIPATION IN A REHABILITATION PROGRAM THAT REQUIRES CONVICTED SEXUAL OFFENDERS TO ACCEPT RESPONSIBILITY FOR THEIR OFFENSES

The Self Incrimination Clause of the Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." Because "[t]he Amendment speaks of compulsion," *United States* v. *Monia*, 317 U.S. 424, 427 (1943), this Court has emphasized that "[t]he constitutional guarantee is only that the witness be not *compelled*

to give self-incriminating testimony." *United States* v. *Washington*, 431 U.S. 181, 188 (1977); see *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 286 (1998). The overriding issue in this case is whether Kansas' decision to condition certain privileges on whether convicted sexual offenders avail themselves of the State's SATP creates impermissible compulsion within the meaning of the Fifth Amendment privilege. As we explain below, that question should be resolved in light of the settled principles governing the constitutional rights of those who have been lawfully committed to a correctional system.

A. The Determination Whether An Inmate Has Been "Compelled" To Incriminate Himself Should Take Into Account The Nature Of The Regime To Which He Has Been Committed

1. "[P]risoners do not shed all constitutional rights at the prison gate, but '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Sandin* v. *Conner*, 515 U.S. 472, 485 (1995) (citation omitted); see *Shaw* v. *Murphy*, 121 S. Ct. 1475, 1479 (2001); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977). A broad range of conditions and choices that would infringe constitutional rights in free society fall within the "expected conditions of confinement" of those who have been lawfully convicted and incarcerated. *Sandin*, 515 U.S. at 487 n.11.

"The limitations on the exercise of constitutional rights [by inmates] arise both from the fact of incarceration and from valid penological objectives—including * * * rehabilitation of prisoners." *O'Lone*, 482 U.S. at 348; see *Bell* v. *Wolfish*, 441 U.S. 520, 546 (1979). Courts owe broad deference to the judgment of those who administer our Nation's penal institutions in determining how to promote such legiti-

mate penological objectives. See *Shaw* v. *Murphy*, 121 S. Ct. at 1480; *Lewis* v. *Casey*, 518 U.S. 343, 349-350 (1996). Moreover, when, as here, "a state penal system is involved, federal courts have * * * additional reason to accord deference to the appropriate prison authorities." *Turner* v. *Safley*, 482 U.S. 78, 85 (1987).

Those principles apply to the Fifth Amendment just as forcefully as they do with respect to the First Amendment and other cherished rights. To be sure, "[a] defendant does not lose [Fifth Amendment] protection by reason of his conviction of a crime." *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984). But, as this Court has recognized, lawful conviction and incarceration necessarily place limitations on the exercise of a defendant's Fifth Amendment privilege. See, *e.g.*, *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976). In *Baxter*, the Court declined to extend to prison disciplinary proceedings the rule of *Griffin* v. *California*, 380 U.S. 609 (1965), that the prosecution may not comment on a defendant's silence at trial. 425 U.S. at 319; see *id.* at 320. As the Court explained, "[d]isciplinary proceedings in state prisons * * * involve the correctional process and important state interests other than conviction for crime." *Id.* at 319.

2. a. The uniqueness of the prison environment informs the determination whether an individual has been "compelled" to act in a manner proscribed by the Fifth Amendment. As the Court explained most recently in *Sandin*, the "expected perimeters of the sentence imposed by a court of law" include a wide range of actions that may adversely affect an inmate's life within the penal system, without implicating any protected liberty interest. 515 U.S. at 485. For example, "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum* v. *Fano*, 427 U.S. 215, 225 (1976). Accordingly, the fact "[t]hat life in one prison is much more disagreeable than in another" does not in itself give rise to any constitutional objection

"when a prisoner is transferred to the institution with the more severe rules." *Ibid.*

The same follows for any number of additional privileges or conditions affecting the "ordinary incidents of prison life," including the entitlement to particular types of food, recreational facilities, or jobs. See *Sandin*, 515 U.S. at 483. Indeed, in *Hewitt* v. *Helms*, 459 U.S. 460, 467 n.4 (1983), this Court concluded that an inmate's transfer to another facility did not in itself implicate a liberty interest, even though that transfer resulted in the loss of "access to vocational, educational, recreational, and rehabilitative programs." Short of the type of "atypical, significant deprivation in which a State might conceivably create a liberty interest," or "arbitrary state action," an inmate may be required to endure many deprivations without being denied any liberty interest. *Sandin*, 515 U.S. at 486-487 & n.11.

When, as an incidental consequence of a valid rehabilitative program, an inmate experiences nothing more than the type of deprivations or hardships that are within the expected conditions of his confinement, he has not been subjected to compulsion proscribed by the Fifth Amendment. One of the basic realities of incarceration is that prison officials may establish incentives for inmates to behave in a manner that advances legitimate penological goals, including rehabilitation. See *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974) ("[S]ince most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody.").

Prison officials may promote such behavior in numerous ways, including by linking the availability of institutional privileges in which inmates enjoy no liberty interest to whether inmates act in a manner that advances legitimate penological goals. Asking inmates to choose between forgoing such privileges, on the one hand, and enrolling in a clinical rehabilitative program that requires them to accept responsibility for their sexual offenses, on the other, does not

subject them to any pressure that is not already inherent in the regime to which they have been committed.

To be sure, forgoing institutional privileges may make prison life more difficult for inmates. But when that is the result of a choice that involves legitimate penological interests, it does not exert the compulsion necessary for a Fifth Amendment violation. Where a correctional program—rehabilitative or otherwise—does not advance a legitimate objective, but instead is simply a pretext for gathering incriminating evidence on inmates, a State could not deny inmates privileges for refusing to participate. But nothing in the Self Incrimination Clause prevents a State from establishing a valid rehabilitative program and encouraging inmates to participate in it by conditioning privileges in which they do not enjoy a liberty interest on their decision to enter the program.[5]

b. The loss of privileges experienced by respondent clearly did not implicate any protected liberty interest.[6] As discussed above, under the IMPP, the reduction in respon-

[5] The breadth of the reasoning that led the Tenth Circuit to a contrary conclusion invites Fifth Amendment challenges by inmates to virtually *any* effort by prison officials to allocate privileges or conditions, even incidentally, based on whether a prisoner has accepted responsibility for his offenses. For example, if the decision below is affirmed, prisoners can be expected to challenge the use of offense severity scores to assign prisoners to more restrictive facilities if (as in the federal system) offense levels take account of whether the prisoner accepted responsibility for the offense of conviction. Cf. Sentencing Guidelines § 3E1.1. Likewise, the Tenth Circuit's expansive rationale could lead to challenges to the routine imposition of rehabilitative treatment (whether for sexual offenders or substance abusers) as a condition of probation, parole, or supervised release. Cf., *e.g.*, 18 U.S.C. 3563(b)(9) (1994 & Supp. V 1999).

[6] Respondent has not argued, nor could he, that his decision not to participate in the SATP increased the sentence that he received for his crimes of rape, aggravated sodomy, and kidnaping. Moreover, respondent's decision not to participate in the SATP did not affect his eligibility for good-time credits or his eligibility for parole. See Pet. App. 10a-12a.

dent's incentive level diminished (but did not eliminate) his privilege to enjoy, *inter alia*, TV ownership, inmate activities, canteen expenditures, visitation, incentive pay, and intake property. See J.A. 27. Those are precisely the sort of "ordinary incidents of prison life" that, as this Court reaffirmed in *Sandin*, are not protected by the Due Process Clause. 515 U.S. at 483; see *Bankes* v. *Simmons*, 963 P.2d 412, 420 (Kan.) (reduction in privileges stemming from refusal to participate in the SATP or other program is "not atypical and do[es] not pose a significant hardship within a prison" and, thus, does "not involve a liberty interest"), cert. denied, 525 U.S. 1060 (1998). Accordingly, the loss of those privileges here does not create the degree of compulsion required to trigger the Self Incrimination Clause.

The same goes for the proposed change in respondent's housing. Indeed, that change is analogous to—and, if anything, *less* consequential than—the transfer challenged in *Meachum*, where this Court held that the Due Process Clause does not in itself protect an inmate from being transferred from a medium-security facility to a maximum-security facility with less favorable living conditions. 427 U.S. at 228-229.[7] As the Court explained, "[w]hatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all." *Id.* at 228. See *Sandin*, 515 U.S. at 486; *Hewitt*, 459 U.S. at 468.

[7] Respondent has asserted that the conditions in the C-2 unit would expose him to a "greater threat of personal harm." Opp. 2 (citing Pet. App. 18a). But prison officials have contradicted that contention. J.A. 78-79. Although the change in conditions does not appear any less favorable than the one involved in *Meachum*, if the Court concludes that that fact is material to the Fifth Amendment analysis in this case, it is genuinely disputed and should preclude summary judgment for respondent.

In sum, any pressure that was placed on respondent by the State's rules for encouraging inmates to participate in prison programs was entirely consistent with the nature of the regime to which he was lawfully committed, and did not rise to the level of compulsion proscribed by the Fifth Amendment.

3. The foregoing analysis establishes a clear and predictable regime for prison administrators seeking to encourage inmate participation in rehabilitative programs with acceptance-of-responsibility treatment goals, and builds on the framework that this Court has established for reviewing the constitutional claims of prisoners. Moreover, the Court's existing due process precedents not only provide a helpful baseline for evaluating claims of unconstitutional compulsion in the prison context, but also minimize the line-drawing problems that the Court sought to foreclose in *Sandin*. See 515 U.S. at 483-484.[8]

B. In Finding Unconstitutional Compulsion, The Court Of Appeals Misconstrued This Court's Precedents And Overlooked The History And Purpose Of The Privilege

1. In finding impermissible compulsion, the court of appeals relied upon "the so-called 'penalty' cases." *Minnesota* v. *Murphy*, 465 U.S. at 434; see Pet. App. 15a-16a. In

[8] If the loss of privileges in which inmates enjoy no liberty interest may amount to impermissible compulsion, then courts will certainly be called upon to decide which privileges are of constitutional magnitude. For example, it could not plausibly be argued that conditioning an inmate's privilege to receive "a tray lunch rather than a sack lunch" (*Sandin*, 515 U.S. at 483) on whether he agreed to participate in a sexual offender treatment program requiring acceptance of responsibility established unconstitutional compulsion. Presumably, the same could be said of the privilege to be housed in a cell with "electrical outlets for televisions." *Ibid.* But at some point, this Court would have to discover a limiting principle for deciding when impermissible compulsion arises due to the loss of such privileges.

those cases, the Court ruled that "the State could not constitutionally seek to compel testimony that had not been immunized by threats of serious economic reprisal," such as the termination of public "employment or eligibility to contract with the State." *Baxter*, 425 U.S. at 317. As the Court put it in *Garrity* v. *New Jersey*, 385 U.S. 493, 497 (1967), "[t]he option to lose [one's] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent."

Whatever the precise effect the fact of incarceration has on the scope of the Self Incrimination Clause, the court of appeals below erred in relying on the Court's penalty cases. This Court has never applied those cases to find a Fifth Amendment violation in the prison context, and with good reason. The penalty cases represent a significant extension of the protection against self-incrimination to preclude not only incrimination in a criminal case, but also being put to a choice between invoking the right and pursuing a livelihood or other important economic interests. Those principles are not easily extended to the prison context, where inmates already have surrendered their rights to pursue a livelihood and to contract freely with the State, as well as their liberty interests in many other basic freedoms.

In addition, there is no indication in this Court's decisions that the state provisions invalidated in the penalty cases were supported by a government interest other than obtaining potentially incriminating information from public employees or contractors. Here, by contrast, the correctional program is directly related to legitimate government objectives, including the rehabilitation of those who have been lawfully committed to its custody. "The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Baltimore City Dep't of Soc. Servs.* v. *Bouknight*, 493 U.S. 549,

556 (1990) (citing cases). That the regulatory program challenged in this case is amply supported by such purposes provides an additional reason to uphold it.

The penalty cases likewise must be considered in light of this Court's precedents recognizing that criminal defendants confront numerous difficult choices from investigation to conviction and release that do not create unconstitutional pressures. See, *e.g.*, *Woodard*, 523 U.S. at 287; *United States* v. *Mezzanatto*, 513 U.S. 196 (1995); *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *Brady* v. *United States*, 397 U.S. 742 (1970). Those cases establish that the Constitution allows the State to ask defendants and inmates to choose between exercising a constitutional right and forgoing that right in exchange for a hope or promise of some benefit. To the extent that the penalty cases invalidate such choices when imposed as generic conditions in particular civil contexts, different considerations apply in the criminal justice system.[9]

Moreover, the penalty cases involved choices that were different in both kind and degree from the choice presented to respondent here—a reduction in privileges governing matters such as TV ownership or recreational activities and transfer to less favorable though still more than adequate housing. Cf., *e.g.*, *Garrity*, 385 U.S. at 497 ("The choice given petitioners was either to forfeit their jobs or to incriminate

[9] In the prison context, correctional officials may present inmates with choices that require them to weigh the continued enjoyment of certain privileges against the perceived disadvantages of submitting to a valid treatment program, even when that program incidentally may require the inmate to disclose potentially incriminating information. That a program requires an inmate to weigh the benefit of *retaining existing privileges* as opposed to the benefit of *obtaining new privileges* is not a difference of constitutional dimension. The constitutionality of Kansas' program should not turn on whether it moves inmates who agree to participate from Level I to Level III, or moves those who decline to participate from Level III to Level I.

themselves."); *Spevack* v. *Klein*, 385 U.S. 511, 516 (1967) ("[T]hreat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion."). Thus, even if the prison context did not make any difference in this case, the penalty cases would still be inapposite.

2. Likewise, nothing in the history of the Fifth Amendment indicates that the privilege against compulsory self-incrimination was intended to proscribe the type of choice presented to respondent. "Historically, the [Fifth Amendment] privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's mouth. The Court has thought the privilege necessary to prevent any 'recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'" *Couch* v. *United States*, 409 U.S. 322, 327 (1973) (citation omitted); see Leonard W. Levy, *Origins of the Fifth Amendment* 328 (1968) ("The element of compulsion or involuntariness was always an essential ingredient of the right [against self-incrimination].").[10]

Justice Frankfurter observed for the Court that "[t]he privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" *Ullmann* v. *United States*, 350 U.S. 422,

[10] The penalty decisions have been criticized for stretching the Fifth Amendment privilege beyond its historical moors. As Judge Friendly observed, "[n]othing in the historical development of the [Fifth Amendment] privilege suggests that threatened loss of employment was the kind of compulsion against which the amendment aimed to protect." Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 707 (1968); see *id.* at 708 & n.158; see also, *e.g.*, Leonard W. Levy, *Constitutional Opinions: Aspects of the Bill of Rights* 208 (1986). As noted above, finding unconstitutional compulsion in this case would require extending the Fifth Amendment privilege even further beyond its original design.

438 (1956). Asking inmates to choose between certain institutional privileges and participation in a rehabilitative program requiring acceptance of responsibility does not subject inmates to an "inquisition," or even the "cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). To the extent that an inmate fears that participation may result in self-incrimination, he may simply decline to participate. While it may make the conditions of his confinement less comfortable, that decision has no incriminating effect whatever.

C. Even If The Kansas SATP Implicates Inmates' Fifth Amendment Rights, It Reasonably Advances Legitimate Penological Goals And Therefore Is Valid Under *Turner*

Even if Kansas' treatment program implicates respondent's Fifth Amendment rights, the SATP is nonetheless constitutional under *Turner*. As the court of appeals recognized, a finding of constitutionally impermissible compulsion begins rather than ends the constitutional analysis. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. As the Court underscored just last Term, "under *Turner* and its predecessors, prison officials are to remain the primary arbiters of the problems that arise in prison management." *Shaw* v. *Murphy*, 121 S. Ct. at 1480.

Turner identifies several potentially relevant factors in determining whether a prison regulation implicating prisoners' constitutional rights furthers legitimate penological goals, including the extent to which the regulation has a rational connection to the State's legitimate interests, and the existence of ready and reasonable alternatives. 482 U.S. at 89-90. To the extent that those factors are relevant to a self-incrimination claim, they point decidedly to the constitutionality of Kansas' SATP.[11] The Tenth Circuit's contrary conclusion is based on a fundamental misapplication of *Turner*.

1. Kansas' program furthers the indisputably legitimate goal of reducing recidivism among convicted sexual offenders. Rehabilitation is a "paramount objective" of any penal system. *Pell*, 417 U.S. at 823; see *Sandin*, 515 U.S. at 485; *O'Lone*, 482 U.S. at 348; Pet. App. 28a. Respondent does not deny that the SATP is a genuine "clinical rehabilitative program." *Id.* at 52a. As discussed above, that program utilizes generally accepted treatment techniques for sexual offenders, and has as its primary objective reducing sexual recidivism among such offenders. See p. 3, *supra*; J.A. 99-100. What is more, the available statistics indicate that the Kansas program actually has succeeded in promoting that objective. 4 *Offender Programs Evaluation* 34 (discussing reduction in sexual recidivism among inmates receiving treatment compared with those who eschewed it).

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[11] In *Turner*, this Court also identified as relevant considerations the availability of alternative means to exercise the constitutional right, and the impact of the regulation on guards, other inmates, and the allocation of prison resources generally. See 482 U.S. at 90. Although the former factor may be instructive in a First Amendment case like *Turner*, we do not believe that it affects the analysis of respondent's Fifth Amendment claim. While the First Amendment makes the existence of alternative channels of communications constitutionally relevant, see, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 797 (1989), there is no analogous Fifth Amendment doctrine. With respect to the latter factor, everyone in the prison environment—including inmates, guards, and other prison officials—benefits from encouraging sexual offenders to receive treatment that may enable them to control their sexual impulses. Sexual offenses *within* prison remain a serious problem in the Nation's penal institutions. In addition, to the extent that information disclosed during the program may be used to prevent inmates from abusing one another or guards, that consideration only bolsters the constitutionality of the Kansas program under *Turner*. See p. 26, *infra*.

At the same time, no one disputes that acceptance of responsibility is a critical component of sexual offender treatment programs. See Pet. App. 28a-29a; *Practitioner's Guide* 73; J.A. 100, 107. As one commentator has explained: "Without acceptance of responsibility, the key goals of treatment are stymied. Denial precludes addressing cognitive distortions, developing empathy for victims, identifying risk factors that may serve as warning signals, developing much needed social skills, and examining deviant sexual arousal." Stefan J. Padfield, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. Kan. L. Rev. 487, 498 (2001).

Respondent has not argued that the Kansas SATP and, in particular, its acceptance-of-responsibility goal are merely subterfuges for gathering incriminating evidence with respect to either the offense of conviction or prior sexual offenses. Cf. *Ferguson* v. *City of Charleston*, 121 S. Ct. 1281, 1291 (2001); *Minnesota* v. *Murphy*, 465 U.S. at 423 n.2. That argument would not be plausible in any event. No inmate has been charged with any offense based on information disclosed during treatment and, although information about other offenses may be disclosed, SATP staff do not "investigate" such offenses during treatment sessions. See p. 4, *supra*. To be sure, treatment presents the *potential* for eliciting information that may implicate criminal activity, but that potential incidental effect does not in itself render the entire program illegitimate.[12]

In addition, the deprivations about which respondent complains directly promote the State's legitimate penological objective of reducing sexual recidivism. Not every convicted sexual offender welcomes treatment. Because denial is a

[12] To the extent that the program were in fact abused by the State as a subterfuge for investigating criminal offenses, an inmate could challenge the use of any incriminating information obtained as a result of that abuse. Cf. *Bouknight*, 493 U.S. at 561-562.

common obstacle to seeking rehabilitative treatment, prison officials must be free to create incentives for convicted sexual offenders to participate in such treatment programs. Indeed, if it were not for the incidental effects of participation on asserted Fifth Amendment interests, nothing in the Constitution would even arguably prevent a State from directing inmates to participate in a valid rehabilitative program. Extending or withholding the type of privileges at issue in this case to provide an incentive for participation in the SATP strikes an appropriate balance between the inmate's interest in avoiding self-incrimination and society's interest in fostering rehabilitation.[13]

Providing more favorable housing to inmates who agree to participate in such programs is also an appropriate incentive. That is especially true when, as here, the differences in housing reflect incidental differences between the treatment facility and other facilities, and when housing changes allow additional inmates to receive rehabilitative treatment declined by others. See J.A. 99.[14]

[13] Indeed, in our view, programs that involved substantially greater incentives would nonetheless strike a constitutional balance. For example, the Fifth Amendment privilege should not pose an obstacle to a program that conditions early release or parole on participation in a sexual treatment program similar to Kansas' SATP. *A fortiori*, encouraging participation in a treatment program within the prison walls is constitutional.

[14] The court of appeals objected to the "automaticity" of the change in institutional privileges resulting from respondent's decision not to participate in the SATP. Pet. App. 25a. Although this Court has relied upon the fact that a consequence did not automatically follow from a decision to invoke the Fifth Amendment privilege as a reason for finding no compulsion, *e.g.*, *Minnesota* v. *Murphy*, 465 U.S. at 438, it has never held that the "automaticity" of a consequence is in itself a basis for finding compulsion, and this case would be a singularly inappropriate vehicle for doing so. In the prison context in particular, prison officials and inmates alike benefit from clear guidelines establishing the consequences flowing from an inmate's decision to behave in a particular fashion.

2. The absence of ready and reasonable alternatives for reducing recidivism among convicted sexual offenders bolsters the constitutionality of the SATP under the *Turner* analysis. Instead of considering the availability of alternative treatments, the Tenth Circuit seized upon the alternative of simply immunizing any statements made during treatment. *Id.* at 30a. That analysis is flawed on three levels: it takes all self-incrimination claims outside of *Turner*; it denies deference to prison officials in advancing legitimate penological goals; and it ignores that the program's confidentiality limits themselves are reasonably tailored to legitimate penological goals.

The most fundamental problem with the Tenth Circuit's analysis is that it would ensure that the government could never satisfy the reasonable-alternatives prong of the *Turner* analysis in a case that implicated a prisoner's interests in avoiding self-incrimination. Immunization is always an alternative, at least in theory, to giving an inmate the choice between forgoing a potential benefit and participating in a rehabilitative program that incidentally may elicit potentially incriminating statements. The Tenth Circuit described immunization as the "obvious, easy alternative" and "one that has been contemplated by the Supreme Court since the very inception of the Fifth Amendment right against self-incrimination." Pet. App. 30a. In light of this supposedly "obvious, easy alternative," the Tenth Circuit discounted Kansas' penological interests and concluded that this "factor weighs heavily in favor of [respondent]." *Id.* at 31a. But that proves too much. It effectively holds that whenever a prison regulation implicates a prisoner's self-incrimination right, the government must offer complete immunity to avoid a constitutional violation. *Turner* stands for the opposite proposition—that prison regulations do not violate the Constitution simply because they implicate constitutional rights.

The Tenth Circuit's singular focus on the possibility of immunization deprived prison officials of the deference that they are due under *Turner*. The Tenth Circuit was so convinced of the sensibility of granting immunity that it nakedly substituted its judgment for that of the relevant state officials, stating: "We are inclined to believe that prisons may better accomplish their goal of rehabilitation if they encourage inmates to admit their sex offenses by granting immunity or making statements privileged." Pet. App. 30a. But decisions concerning whether to immunize prisoner statements and the scope of confidentiality or immunity are precisely the kind of decisions that state officials, rather than federal courts, should be making. Although immunization is always an option in theory, it is not always a realistic or desirable option in practice. If officials must choose between immunizing incriminating statements concerning child abuse and offering effective treatment, treatment goals may suffer. That is not to say courts should ignore the possibility of offering immunity in the *Turner* analysis. But government decisions as to the scope of confidentiality and immunization, no less than other decisions that implicate constitutional interests, should be accorded deference.

The Tenth Circuit's analysis ignored the substantial confidentiality provided inmates under the SATP, and that the limitations on that confidentiality are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 88. The SATP broadly grants participants confidentiality for statements made during treatment. That broad grant of confidentiality has three principal limits. Participants are warned at the outset that statements will not remain confidential to the extent they involve child abuse, "situations which could be harmful to [the inmate] or others, or a threat to the orderly operation of the facility." J.A. 35. BOP's own treatment program has three parallel exceptions to confidentiality. See p. 27, *infra*.

Those exceptions clearly further legitimate penological and public safety interests. To begin with, the State manifestly has an overwhelming interest in preventing and redressing the sexual abuse of children and, accordingly, numerous States and the federal government make an exception to patient-therapist privileges for information relating to child abuse. See *Jaffee* v. *Redmond*, 518 U.S. 1, 34 (1996) (Scalia, J., dissenting) (listing state laws); see also 42 C.F.R. 2.22(b)(4) (establishing similar exception for federally assisted drug and alcohol counseling programs).

Prison officials have an equally obvious interest in redressing threats to individuals within the prison system, such as ongoing sexual abuse of other inmates. Indeed, protecting "institutional security and safety" is within the heartland of legitimate penological concerns. *Turner*, 482 U.S. at 93. BOP's treatment program recognizes that and places similar limits on confidentiality, see p. 27, *infra*, as do other federal counseling programs. See 42 C.F.R. 2.22(b) (information about commission of crimes on premises or against individuals involved in program must be reported). When "[o]ther well-run prison systems, including [BOP], have concluded that substantially similar restrictions on [confidentiality] were necessary to protect institutional order and security," it is clear that blanket immunization is not a ready or reasonable alternative. *Turner*, 482 U.S. at 93.

D. If The Court Concludes That The Kansas SATP Violates The Fifth Amendment, It Should Be Careful To Avoid Casting Doubt On The Validity Of Other Treatment Programs

If this Court concludes that the Kansas SATP violates respondent's Fifth Amendment rights, we urge it to avoid casting doubt on the validity of other sexual offender treatment programs, including the federal program, which may differ in material respects from the program at issue here.

BOP's program is conducted at a single facility in Butner, North Carolina and has only 112 spaces. The program "adheres to the notion that * * * criminal sexual behavior can be effectively managed in most cases through competent treatment and intensive supervision." *Program Description* 1. "[E]ach program participant is expected to * * * [demonstrate] [c]omplete acceptance of responsibility for [his] sexual crime(s)." *Id.* at 2. The "confidentiality [of disclosures] is protected at all times, except in cases where there is potential harm to self or others, when the security of the correctional institution is threatened, or when there is suspected child abuse." *Id.* at 3. Inmates are advised of those limits at the outset, and inmates who choose to participate in the program must agree to them in writing.

BOP does not condition the availability of institutional privileges on participation in its treatment program, in which there are only a limited number of spaces. Inmates must "volunteer for participation in the treatment program and demonstrate a commitment to behavioral change." *Program Description* 3. In addition, BOP seeks only "the most motivated and psychologically suitable offenders" for treatment. *Id.* at 1. "[F]ailure to achieve treatment goals may result in programmatic probation or immediate expulsion," which may in turn result in the inmate's transfer to his "parent facility." *Id.* at 3, 4.

Even under the expansive reasoning of the court of appeals, there is no basis for concluding that the possibility of such a transfer exerts impermissible compulsion within the meaning of the Fifth Amendment. No loss of institutional privileges flows from an inmate's decision not to participate in the program. Moreover, the federal goal of reducing sexual recidivism is undeniably legitimate and directly promoted by offering this type of treatment to convicted sexual offenders. In short, the federal program is clearly constitutional under the Fifth Amendment and *Turner*.

* * * * *

Studies increasingly indicate that rehabilitative programs that promote acceptance of responsibility may enable sexual offenders to manage their criminal sexual impulses and thereby reduce sexual recidivism. The Court should leave correctional officials with the leeway that the Constitution and our laws afford them to develop and encourage inmate participation in such commendable treatment efforts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2001

Supreme Court, U.S.
FILED

JUL 12 2001

OFFICE OF THE CLERK

No. 00-1187

In The Supreme Court Of The United States

DAVID R. McKUNE, Warden, et al.,

Petitioners,

v.

ROBERT G. LILE,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF 18 STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the States, consistent with the Fifth Amendment privilege against self-incrimination, may deny special privileges to imprisoned sex offenders who refuse to participate in rehabilitation programs that call for the offenders to discuss their past sex offenses with prison counselors.

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INTEREST OF THE *AMICI* STATES

The 18 *amici* States write to urge the Court to reverse the judgment of the court of appeals. At stake is the States' reasonable and sincere interest in rehabilitating convicted sex offenders incarcerated in state prisons, as well as the States' no-less-legitimate interest in investigating as-yet-unprosecuted allegations of child molestation or other sex offenses.

Child molestation in particular has a devastating effect on its victims, leaving emotional scars that often far exceed its very real physical injuries. R. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse and Neglect 177 (1983). Sex offenses involving children are distressingly widespread, with studies suggesting that between 52 and 64 percent of women are sexually molested before age eighteen. G. Wyatt, *The Sexual Abuse of Afro-American and White American Women in Childhood*, 9 Child Abuse and Neglect at 507-19 (1985). Because of the depth and breadth of the problem, all States work hard to prevent past sex offenders from committing similar crimes in the future, and also work hard to prosecute those offenders who have not yet been punished for their crimes.

Unfortunately, the decision below forces state corrections officials to choose between two of the most important weapons in that fight. One is the obligation of public officials – including state corrections officers – to report to the relevant law enforcement authorities in their State any information that the officials learn about cases of suspected child abuse. Precisely because far too many sex offenses go unreported as it is – particularly those offenses involving children – many States at least impose that reporting obligation on those public officials who have reason to believe that a child has been sexually abused, see Appendix A, while many of those States likewise permit

public officials to report to the police any information that they learn from any source about past sex crimes involving adult victims as well.

The other weapon on which most States rely in combating sex crimes is the kind of forward-looking treatment program like the one at issue in this case. As in Kansas, many effective sex offender treatment programs call for state or other government officials to document each offender's past sex offenses as part of the process of helping those offenders move beyond their crimes toward a better future. And because most official records grossly understate the extent of an offender's past sexual misdeeds, *see* R. Hanson, R. Steffey & R. Gauthier, *Long-term Recidivism of Child Molesters*, 61 Journal of Consulting & Clinical Psychology 646, 650 (1993), the information that offenders "self-report" is crucial in helping state officials understand the full scope of each sex offender's past and current problems as those offenders enter treatment and rehabilitation programs in state prisons or elsewhere. G. Abel, J. Becker, M. Mittlemen, J. Cunningham-Rathner, J. Rouleau, and W. Murphy, *Self Reported Crimes of Non-Incarcerated Paraphiliacs*, 2 Journal of Interpersonal Violence 3, 21 (1987).

The Tenth Circuit's approach – barring state officials from imposing any adverse consequences on those imprisoned sex offenders who, during the course of prison sex-offender treatment programs, refuse to discuss their past offenses – undermines both of the legitimate state interests described above, and will in many cases force States to forego one goal to pursue the other. That approach is not compelled by the Fifth Amendment, and is inconsistent with this Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987).

Surely the States may ask that imprisoned sex offenders discuss their past sex offenses as part of the

rehabilitation process, and may deny special in-prison privileges to those inmates who refuse to do so. And certainly the States ought not be forced to undercut their equally valid interest in deterrence by having to guarantee that the offenders will never be punished for any as-yet-unprosecuted sex crimes that the offenders reveal in those rehabilitation sessions. Because the judgment below is not compelled by the Constitution, and because it improperly undercuts the States' dual interests in punishing sex offenders for past crimes and in rehabilitating those offenders effectively to prevent future crimes, the judgment below should be reversed.

SUMMARY OF ARGUMENT

The States are entitled to operate sex offender rehabilitation programs that direct imprisoned offenders to acknowledge their past crimes, for many States have sensibly concluded that inmates who speak openly about their past wrongdoing are less likely to commit similar offenses in the future. When, as in this case, an imprisoned sex offender refuses for whatever reason to participate in such a rehabilitation program, the Fifth Amendment's privilege against self-incrimination does not bar state prison officials from denying special privileges to the non-participating inmate. The kind of consequences in question – a transfer to another prison where television sets are not placed in each inmate's cell and where the exercise facilities are not readily available – are simply not ones that can rightly be said to compel a prisoner to speak about his past crimes despite his desire to remain silent.

And even were the State's imposition of those consequences troubling as a general matter, the fact that they are imposed on *prisoners* is critically important in weighing the constitutional issue raised here. The States face tremendous challenges in managing their prisons, and often

must weigh rehabilitative, punitive and public safety interests that have few equivalents outside prison walls. As this Court has said in previous decisions, the States' prison-management practices and the interests that support them deserve considerable deference from the courts. That is surely true here, where the Kansas sex-offender rehabilitation program represents a sensible approach to a vexing problem, and where Kansas has concluded that alternative approaches like those suggested by the court of appeals will not promote the State's interests as effectively as the program now in place.

ARGUMENT

I. Requiring Offenders To Accept Responsibility For Their Criminal Conduct As Part Of A Sex Offender Treatment Program Does Not Constitute Compulsion Within The Meaning Of The Fifth Amendment.

The Fifth Amendment of course protects the right of all citizens to remain silent in the face of questioning from the government about any past wrongdoing. Just as certainly, however, the Constitution permits the States to withhold from their prisoners special privileges – like in-cell television sets and access to exercise equipment – when those prisoners refuse to participate in reasonable efforts to rehabilitate them. And that is true even where, as here, a State chooses not to grant those special privileges to convicted sex offenders who choose not to discuss their past crimes with prison counselors.

This Court has long held that the government need not make the exercise of the Fifth Amendment privilege cost-free. See, e.g., *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (a criminal defendant's exercise of his Fifth

Amendment privilege prior to arrest may be used to impeach his credibility at trial); *McGautha v. California*, 402 U.S. 183, 217 (1971) (the Fifth Amendment is not violated when "a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt") *Williams v. Florida*, 399 U.S. 78, 84-85 (1970) (a criminal defendant may be compelled to disclose the substance of an alibi defense prior to trial or be barred from asserting it).

And in civil proceedings, the government does not "offend[] the Fifth Amendment" when it "draw[s] adverse inferences" from a person's "refusal to answer questions." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 286 (1998) (unanimously rejecting Fifth Amendment challenge to State's voluntary clemency interview process). Just as Ohio gave the prisoner in that case the "choice . . . [between] providing information . . . at the risk of damaging his case for clemency" on the one hand, and "remaining silent" on the other, *id.* at 287-88, so in this case, Kansas has simply given its imprisoned sex offenders the option either to provide information about past offenses during in-prison rehabilitation sessions (thereby perhaps triggering future criminal prosecutions for newly-revealed wrongdoing), or to remain silent (thereby perhaps causing prison officials to "draw adverse inferences," *id.* at 286, and in turn revoke from the silent prisoner some of the special privileges that other prisoners enjoy).

Prisoners, criminal defendants, and ordinary citizens make choices all the time in their dealings with the government. As the Court explained in *McGautha*, "[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by

that token always forbid requiring him to choose." *McGautha v. California*, 402 U.S. at 213 (citation and quotations omitted).

The critical questions are these: Has Kansas compelled its prisoners to incriminate themselves, and is the consequence of a prisoner's refusal to discuss his past offenses so severe that the prisoner has little choice but to speak? The answer to both questions is No.

On the issue of compulsion, Kansas of course does not compel anything. To be sure, convicted sex offenders confined in state custody in Kansas and elsewhere are expected to participate in some rehabilitative activities when told to do so by court order, by state law or by a directive from prison officials. But prisoners like the respondent in this case can certainly refuse to so participate. No officials torture them, beat them or otherwise insist that the prisoners talk. Prisoners retain a choice on the issue, and no actions of state officials run afoul of the "torture, bullying and imprisonment for contempt" concerns that the Fifth Amendment's Framers sought to allay. See L. Levy, *History and Judicial History: The Case of the Fifth Amendment in Constitutional Opinions: Aspects of the Bill of Rights* 208 (L. Levy, ed. 1986).

As for the consequences of a prisoner's silence during the kind of sex-offender rehabilitation sessions like the one at issue here, Kansas officials simply transfer the uncooperative inmate to another prison, where his access to a television, to prison activities, and to a gymnasium are lost. Even the court of appeals agreed that those consequences do *not* include a lengthier prison sentence or a new criminal conviction. The consequences that fall on a sex offender who refuses to discuss his past offenses flow from his unwillingness to participate in an activity that prison officials deem important for the inmate's – and the community's – long term well-

being. No one orders the prisoner to confess his crimes, to make incriminating statements under oath, or to serve a longer time in custody. The government's actions simply deprive him of particular privileges enjoyed by inmates who *do* participate in the rehabilitation program that the prison sensibly hopes to promote.

The States' interest in facilitating the rehabilitation of their incarcerated sex offenders is undeniable. This Court itself has recognized that an admission of guilt, if not coerced, advances the goals of both justice and rehabilitation. *Michigan v. Tucker*, 417 U.S. 434, 448, n.23 (1974). The Court has further acknowledged the important differences between prison disciplinary proceedings on the one hand and criminal prosecutions on the other. *Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976). Given the minimal consequences here, this case surely falls in the former category.

Just as the death-row prisoner in *Woodard* could choose whether to speak at the voluntary clemency interview at issue in that case, 523 U.S. at 286, so the prisoner in this case is free to choose whether to speak at the prison rehabilitation sessions when he is asked to open up about his past sexual history. Those choices of course carry consequences – in *Woodard*, the potential impact of the prisoner's statement or silence on the Governor's decision whether to spare his life, and in this case, the possibility that a statement about past uncharged offenses might lead to new penalties, and the likelihood that silence might lead to reduced privileges – but defendants remain free to make the choice that seems best for them.

Even the sex offender who has the most to lose by speaking (presumably because he fears revealing a string of past offenses for which he has never been prosecuted or punished), can sensibly choose – like the respondent in this

case – to sit silent during the rehabilitation sessions. The resulting consequences that he then faces are simply not the type of potent sanction that the Fifth Amendment is designed to guard against. The judgment of the court of appeals on the Fifth Amendment issue should be reversed.

II. The Kansas Program Is Reasonably Related To Legitimate Penological Interests.

Even if the mild adverse consequences that the respondent has challenged in this case are incompatible with general Fifth Amendment principles, Kansas and other States should be entitled to impose those consequences in the unique and limited setting in which they apply: amongst convicted and imprisoned criminals. Under *Turner v. Safley*, 482 U.S. 78 (1987), courts are to give considerable deference to the States' legitimate penological interests when prisoners raise constitutional claims, even if those claims "would raise grave . . . concerns outside the prison context." *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). The decision below failed to follow *Turner*'s rule of deference in several specific ways.

First, the court of appeals placed undue emphasis on the nature of the right asserted, applying *Turner* in a half-hearted way that is at odds with both *Turner* itself and with later cases. The court of appeals also misapplied *Turner*'s four-part test, equating the constitutionally insignificant consequences at issue here with the outright denial of a constitutional right, reversing the applicable burden of proof and ignoring the very heavy costs that judicially imposed alternatives would exact on the States' penological objectives.

Because the court of appeals was "inclined to believe that prisons may better accomplish their goal of rehabilitation" in some other way besides the route chosen by

Kansas, *Lile v. McKune*, 224 F.3d 1175, 1192 (10th Cir. 2000), that court stuck down a practice that the States ought to be free to follow. The appellate court's approach runs afoul of *Turner*'s core precept that "prison administrators . . . and not the courts, [are] to make the difficult judgments" about the best ways to run our nation's prisons. *Turner*, 482 U.S. at 89 (quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128 (1977)).

A. The Court Below Improperly Downplayed The Importance Of The State Interests At Stake.

The court below candidly admitted that the "real" basis for its non-deferential application of *Turner* was "the seriousness with which we have always treated the Fifth Amendment right against self incrimination." *Lile*, 224 F.3d at 1192. While there is no disputing the importance of that right, the equally indisputable underpinning of *Turner* – the immense challenge that the States face every day in running their prisons – requires that *Turner* be applied dutifully regardless of the constitutional right in question.

The *Turner* test of course rests on the reality that incarcerating and rehabilitating prisoners is an "inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 85. Because those "Herculean" tasks "are complex and intractable," *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), and because "courts . . . are not equipped by experience or otherwise to 'second guess' the decisions of state legislatures and administrators in this sensitive area," *Jones*, 433 U.S. at 137 (Burger, C.J., concurring), *Turner* requires great deference to correctional officials' informed opinions of what is necessary to effectively accomplish what society expects of them.

Those realities are not changed by the nature of the constitutional right asserted by any given prisoner, and therefore "*Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990) (emphasis added). The Court reiterated that view just last Term. See *Shaw v. Murphy*, 121 S. Ct. 1475, 1479 (2001) ("*Turner* . . . set[] a unitary, deferential standard for reviewing prisoners' claims"). That standard applies "even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." *Washington*, 494 U.S. at 223.

In short, *Turner* is based on the practical demands of the correctional mission, not on a court's view of the importance of the right asserted. Those operational demands are consistently formidable regardless of the legal issues they generate. Common sense and this Court's teachings require that the States' management of their prisons must therefore be evaluated in a consistently deferential manner.

B. The Kansas Program Meets *Turner's* Four-Part Test.

Turner calls for courts to examine four factors when weighing whether a prison regulation is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Those factors are (1) whether the regulation is rationally tied to such an interest, (2) whether prisoners enjoy alternate means to exercise the restricted right, (3) the effect on guards, other inmates and prison resources if the regulation is abandoned, and (4) the existence of alternatives that might accommodate the prisoner's right without unduly hampering the State's valid penological interests. *Turner*, 482 U.S. 89-91. Each of the *Turner* factors decidedly supports the mild

incentives implemented by Kansas to promote sex offender rehabilitation.

a. The Program Furthers Valid Penological Interests.

The regulation at issue is reasonably related to two valid penological interests: rehabilitation and deterrence of crime.

The rehabilitation of convicted sex offenders is of course a legitimate and pressing interest of the States. Many of the States, like Kansas, work to confront the ongoing cycle of violence to which many sex offenders are prone by asking those offenders to themselves confront and discuss openly their past behavior. "Denial is generally regarded as a main impediment to successful therapy," and "[t]herapists depend on offenders' truthful descriptions of events leading to past offenses in order to determine which behaviors need to be targeted in therapy." H. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, Vol. 3, No. 5, Forum on Corrections Research 30 (1991). The Kansas program at issue here furthers the State's rehabilitative goal by calling for prisoners to give the kind of complete and truthful answers that successful therapy programs demand.

And although often overlooked, deterrence also is "[a]n important function of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). By subjecting offenders to prosecution for newly-revealed offenses, and by adhering to its chosen policy of mandatory reporting for cases of suspected child sexual abuse, Kansas reinforces the sensible notion that wrongdoing carries consequences.

b. The Program Does Not Prevent Prisoners From Choosing To Remain Silent.

The second *Turner* factor asks whether "other avenues remain available for the exercise of the asserted right." *Turner*, 482 U.S. at 90 (quotations omitted). The court below concluded that no such alternatives exist for the respondent prisoner to exercise his Fifth Amendment right. That analysis is flawed in two important respects.

First, it overstates the effect of the Kansas rehabilitation program on the right of prisoners to remain silent. The Kansas program – like many similar programs across the country – does not compel prisoners to testify against themselves. Those programs do not subject uncooperative prisoners to any penalties beyond the scope of their lawfully imposed sentences, but instead simply deny special privileges to those prisoners who choose not to participate. Prisoners may maintain their silence if they so chose, and if they do so, they merely lose certain privileges to which they never had any entitlement in the first place.

Second, the court of appeals ignored this Court's words describing the degree of accommodation that is required. "The Constitution, we said, 'does not mandate comfortable prisons,' . . . and only those deprivations denying 'the minimal civilized measure of life's necessities,' . . . are sufficiently grave" so as to offend its principles. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349, 347 (1981)). No one claims that the respondent would be subject to anything approaching that constitutional floor under the Kansas offender-rehabilitation program. That the choices an offender faces under the Kansas system might be "'unimpressive' if offered to justify a restriction on . . . members of the general public"

is irrelevant, because prisoners and prison life are simply different than life on the outside. *Turner*, 482 U.S. at 88 (quoting *Pell*, 417 U.S. at 825). Given those precepts, the court of appeals wrongly equated the withholding of prison privileges with a complete denial of the Fifth Amendment privilege, and wrongly faulted Kansas for giving prisoners the choices that are available to them in this situation.

c. Other Approaches Might Adversely Affect The Prison Environment.

Although the court of appeals devoted little analysis to *Turner*'s third factor, that decision calls for consideration of "the impact accommodation of the asserted constitutional right will have on guards and other inmates." *Turner*, 482 U.S. at 90. The court below did not address that impact as it should have.

Procedurally, the court below minimized the third *Turner* factor, saying that it saw "no evidence that accommodation of the right would have any negative effect." *Lile*, 224 F.3d at 1191. Yet any lack of proof on the impact of accommodating the respondent prisoner's Fifth Amendment claim actually supports, rather than undermines, the approach that Kansas and other States have adopted. Both before and after *Turner*, the Court has explained that the burden of proof concerning the impact of prison regulations that affect prisoner rights is on the affected prisoner or prisoners, not on the State. See *Shaw v. Murphy*, 121 S. Ct. at 1481 ("[u]nder *Turner*," prisoners "must overcome the presumption that the prison officials acted within their 'broad discretion'"); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. at 128 ("the burden [i]s not on [corrections officials] . . . to show affirmatively that the [disputed matter] . . . would be detrimental to proper penological objectives or would constitute a present danger to security and order") (quotations omitted).

Substantively, the accommodation suggested by the court of appeals – granting immunity to prisoners for any statements that they make during sex-offender rehabilitation sessions – could very well disrupt prison operations significantly by exacerbating tensions between sex offenders and other inmates. Granting sex offenders immunity for their statements about what are in many cases very serious crimes would give them a benefit not given to other inmates. That special treatment would not go unnoticed by other inmates, and the resulting tensions would likely add to the difficulties that the States face in managing an already volatile environment. Blanket immunity would, in effect, force officials to chose between two conflicting imperatives: promoting effective rehabilitation and maintaining internal security. "Where exercise of a right requires that kind of tradeoff, . . . the choice made by corrections officials – which is, after all, a judgment 'peculiarly within [their] province and professional expertise' . . . – should not be lightly set aside by the courts." *Turner*, 482 U.S. at 92-93 (quoting *Pell*, 417 U.S. at 827).

d. Other Approaches Could Well Undercut Important State Interests.

The final *Turner* factor looks to the availability of ready alternatives that will impose little cost to the State's objectives while accommodating the prisoner's rights. *Turner*, 482 U.S. at 90-91. "This is not a 'least restrictive alternative' test," and such alternatives only exist if they "fully accommodate[] the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 91.

The use-immunity alternative suggested by the court of appeals would in fact exact a significant cost by requiring the States to compromise their "valid penological objectives," which include "deterrence of crime,

rehabilitation of prisoners and institutional security." *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987). State officials must rely in large part on "[s]elf-report[ed] information" in rehabilitating sex offenders, because arrest records alone typically do not provide a true picture about a sex offender's history of violence. G. Abel, J. Becker, M. Mittlemen, J. Cunningham-Rathner, J. Rouleau, and W. Murphy, *Self Reported Crimes of Non-Incarcerated Paraphiliacs*, 2 Journal of Interpersonal Violence 3, 21 (1987). Yet granting use immunity to offenders who self-report previously unprosecuted crimes could very well frustrate the States' important interest in deterring criminal sexual conduct.

The strength of the States' interest in deterrence-through-punishment is reflected in the fact that every State has enacted statutes *requiring* that all cases of suspected child molestation be reported for prosecution when discovered. See Appendix A. Granting use immunity to sex offenders who reveal previously unreported or unprosecuted instances of child sexual abuse would cut the legs out from under those statutes, for without the testimony of the offender himself, the uncorroborated testimony of a child victim is often not enough to secure a conviction. "There are seldom other witnesses or corroborating physical evidence," and "the crime usually involves many separate acts occurring over a period of time," making "accurate reporting of the sequence of events a difficult task for a child." L. Berliner & M. Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. Soc. Issues 125, 129 (1984).

In short, the alternative approach offered by the court of appeals would require Kansas to choose between two of its most powerful weapons in the fight against the sexual abuse of children: effective rehabilitation and effective prosecution. That alternative would compel Kansas to fight the sexual abuse of it most vulnerable citizens with one hand tied behind its back, and would plainly impose more than a "*de*

minimis cost to valid penological interests." *Turner*, 482 U.S. at 91.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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July 2001

APPENDIX

State Statues That Impose A Duty On State Officials Or Others To Report Suspected Child Sexual Abuse To Law Enforcement Authorities

Ala.Code §26-14-3
Alaska Stat. §47.17.020
Ariz. Rev. Stat. §13-3620
Arkansas Code §12-12-507
Cal. Penal Code §§11165.9
Col. Rev. Stat. Ann. §19-3-304
Conn. Gen. Stat. §17a-101
16 Del. Code Ann. §903
Fla. Stat. §39.201
Georgia Code §19-7-5
Hawaii Rev. Stat. §350-1.1
Idaho Code §16-1619
325 Ill. Comp. Stat. 5/4
Indiana Code Ann. §31-33-5-1
Iowa Code §232.69
Kansas Stat. Ann.§38-1522
Ky. Rev. Stat. §620.030
La. Children's Code Art. 609
22 Maine Rev. Stat. §4011
Md. Fam. Law Code §5-705
Mass. Ann. Laws ch. 119 §51A
Mich. Comp. Laws §722.623
Minn. Stat. §626.556
Miss. Code §43-21-353
Rev. Stat. Mo. 210.115
Montana Code Ann. 41-3-201
Neb. Rev. Stat. §28-711
Nevada Rev. Stat. §432B.220
N.H. Rev. Stat. §169-c:29

N.J. Stat. §9:6-8.10
N.M. Stat. Ann. §32A-4-3
N.Y. Cons. Social Services Law §413
N.C. Gen. Stat. §7B-301
N.D. Cent. Code §50-25.1-03
Ohio Rev. Code §2151.421
10 Okla. Stat. §7103
Ore. Rev. Stat. §419B.010
23 Pa.C.S. §6311
R.I. Gen. Laws §40-11-3
S.C. Code §20-7-510
S.D. Cod. Laws §26-8A-3
Tenn. Code Ann. §37-1- 403
Tex. Fam. Code §261.101
Utah Code Ann. §62A-4a-403
33 Vt. Stat. Ann. §4913
Va. Code Ann. §63.1-248.3
Wa. Rev. Code §26.44.030
W.Va. Code §49-6A-2
Wis. Stat. §48.981
Wyo. Stat. §14-3-205

September 12, 2001 (8)

FILED
SEP 12 2001
CLERK

No. 00-1187

IN THE
Supreme Court of the United States

DAVID R. MCKUNE, Warden,
CHARLES SIMMONS, Secretary,
KANSAS DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

ROBERT G. LILE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF

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12 pp

QUESTION PRESENTED

Whether the revocation of correctional institution privileges violates the Fifth Amendment's privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate's failure to accept responsibility for his crimes as part of a sex offender treatment program?

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465 U.S. 420 (1984) 5
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523 U.S. 272 (1998) 5
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515 U.S. 472 (1995) 3
Turner v. Safley,
482 U.S. 78 (1987) 4

ARGUMENT

Respondent essentially offers the Court two "solutions" in this case: (1) require Kansas to immunize all inmates who participate in the Sexual Abuse Treatment Program (SATP) or (2) classify *all* inmates as maximum security inmates and give them the least amount of prison privileges possible, making them *earn* anything better. Resp. Br. 7.

The first "solution"—which the Tenth Circuit endorsed in this case—puts the cart before the horse, by solving a problem that does not exist. If there is no unconstitutional "compulsion" to begin with, then there is no constitutional reason why Kansas should have to immunize inmates' statements.

The second "solution" is an ironic suggestion that, although perhaps theoretically possible to implement, would actually work to the detriment of thousands of inmates in this country who would not otherwise be placed in maximum security conditions. Thus, this "solution" is probably both counterproductive and fanciful, at best.

With all due respect, the best "solution" is to permit the States the ability to require violent sex offenders such as respondent to make some difficult choices that, in the long run, will benefit the offenders themselves and society. Without strong incentives to participate in prison treatment programs in a meaningful way, many inmates will refuse to do so, as respondent has amply demonstrated. Permitting inmates to participate only on their own terms—which will undermine a key component of the treatment—is no "solution." This Court should conclude that the Kansas SATP is constitutional.

II. Kansas Neither Concedes Nor Acknowledges That Respondent Would Be "Punished" For Invoking His Fifth Amendment Rights When He Refuses To Participate In The Sexual Abuse Treatment Program

Contrary to suggestions made by respondent, Kansas has neither conceded nor acknowledged that respondent would be "punished" for invocation of his Fifth Amendment rights. Rather, he would suffer a loss of *privileges*—to which he has no entitlement and in which he has no liberty interest—for refusing to comply with the requirements of the Sexual Abuse Treatment Program (SATP). Refusing to participate in a meaningful way in the Kansas SATP is a *choice* that respondent indeed can make, but he has no constitutional right to insist that such a choice have absolutely no consequences for him.

This proposition is poignantly illustrated by an exchange between the warden of Lansing prison, David R. McKune, and one of respondent's attorneys, during McKune's deposition:

> Q. Okay. And you've talked about a person — an inmate's decision to enter into the SATP program and other programs as their choice, is that correct?
>
> A. Yes.
>
> Q. You refer to it as a choice?
>
> A. Yes.
>
> Q. All right. And that they must deal with the consequences if they refuse not to choose to enter the program.
>
> A. Correct.
>
> Q. And that's how you see the incentive level system, correct?
>
> A. Correct.

> Q. You'd admit, then, that there's a price that they have to pay for making that choice, wouldn't you?
>
> A. There are consequences of that choice, yes.
>
> Q. Okay. So it's not a completely free and unfettered choice, is it?
>
> A. Are there any?
>
> Q. But —
>
> A. I mean, there's consequences to every choice you make in life, and there are consequences to that choice as well.

J.A. 81-82.

Moreover, neither court below made a factual finding that respondent would be "punished" for refusing to participate in the SATP. Rather, the question whether particular circumstances amount to "punishment" for constitutional purposes is a question of law subject to *de novo* review, as in *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Selective quoting of snippets of the record taken out of context does not establish that respondent would be "punished" for invoking his Fifth Amendment rights when he refuses to participate in the Kansas SATP. Rather, Kansas respectfully urges the Court to consider the entirety of the evidence in the Joint Appendix, as well as the relevant "compulsion" cases discussed in Kansas's opening brief. Doing so will demonstrate that respondent is not being "compelled" to incriminate himself, and thus he has no valid Fifth Amendment claim.

II. Only A Liberty Interest Analysis Can Provide Prison Administrators With Clear Guidance

Respondent concedes, as he must, that only a liberty interest analysis—as in *Sandin v. Conner*, 515 U.S. 472

(1995)—will give prison administrators clear guidance. Also, respondent concedes, again as he must, that prison inmates such as himself have no constitutional entitlement to any particular security or housing classification.

Nonetheless, respondent urges on this Court an indeterminate balancing of interests that will provide no one guidance and that will ensure plenty of litigation by prison inmates challenging various aspect of the numerous prison programs that exist in the state and federal prison systems.

Moreover, respondent also recognizes that the application of the *Turner v. Safley*, 482 U.S. 78 (1987) balancing test to claims other than those involving First Amendment interests has never been made clear by this Court. Respondent, however, urges formulaic application of the four *Turner* factors—like the Tenth Circuit's analysis in this respect—focusing heavily on the question whether respondent has any alternative means of exercising his Fifth Amendment rights.

But this demonstrates the potential impropriety of the *Turner* factors outside the First Amendment context. In a Fifth Amendment case, it is impossible to see how the affected inmate would *ever* have an alternative way of exercising his rights. He either speaks or he invokes the privilege; there is nothing else he can do.

The Tenth Circuit and respondent both argue that all the State needs to do in such situations is immunize the inmate. But there are reasons the State might not wish to do so, and there is no constitutional reason why the State must. Indeed, using the *Turner* factors as both the Tenth Circuit and respondent do in this case, a Fifth Amendment claim by an inmate will *always* compel the State to immunize the inmate's statements, because there is no alternative means for the inmate to exercise his rights.

This result is contrary to the fundamental purpose of the *Turner* analysis—requiring federal courts to give deference to the reasonable judgments of federal and state prison administrators in managing extremely difficult inmate populations. It also puts the cart before the horse in the Fifth Amendment context, because a court may—as the Tenth Circuit did here—essentially conclude that the State must immunize inmates' statements without ever really grappling with the preliminary Fifth Amendment issue, which is whether an inmate is being subjected to unconstitutional "compulsion." Without "compulsion," there simply is no Fifth Amendment claim, and the State cannot be constitutionally required to immunize statements.

III. The Prison Conditions At Issue Here Do Not Amount To Unconstitutional Compulsion

The parties do not disagree in this case on the privileges that would be withheld from respondent for his refusal to participate in the SATP. Rather, we disagree as to the legal significance of those withheld privileges. With all due respect, Kansas relies principally on the discussion in its opening brief to refute respondent's attempted characterization of cases such as *Baxter v. Palmigiano*, 425 U.S. 308 (1976), *Minnesota v. Murphy*, 465 U.S. 420 (1984), and *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), as somehow involving *less* significant consequences than in this case. Indeed, in all three cases, the person invoking his Fifth Amendment privilege faced significantly greater consequences than the loss of a personal television.

Moreover, respondent does not even begin to address the complex and potentially suggestive history of the privilege against self-incrimination. Instead, respondent basically asserts that the Fifth Amendment prevents more than just confessions obtained by torture—a point that Kansas will obviously concede—but adds virtually no further explication. Again, Kansas relies principally on the historical discussion in

its opening brief to suggest that loss of a personal television simply does not fall within the protections of the privilege.

Lastly, respondent suggests that "[t]o Mr. Lile, the sanctions threatened by the State make the assertion of his privilege costly." Resp. Br. 31. But respondent's personal opinion is not the constitutional measure of the Fifth Amendment's scope. Indeed, this Court previously and clearly has rejected any notion that what amounts to "punishment" for constitutional purposes is to be measured by the *subjective beliefs* of the person affected. "[W]hether a sanction constitutes punishment is not determined from the defendant's perspective." *Department of Revenue v. Kurth Ranch,* 511 U.S. 767, 777 n.14 (1994).

IV. Respondent's Proposed Analysis Would Give Prison Administrators The Ironic Incentive To Place All Sex Offenders—If Indeed Not All Inmates—In Maximum Security When They Enter Prison

Kansas finds it more than a trifle ironic that respondent suggests that Kansas avoid potential Fifth Amendment problems by (1) classifying *all* inmates as maximum security when they first enter prison, (2) giving them the minimum conditions and privileges that are constitutionally acceptable, and (3) making them earn any additional or better privileges or conditions. Resp. Br. 7. Although perhaps theoretically possible, such a "solution" would be dramatically different from longstanding, established prison management practices and principles. Such a "solution" would also work to the detriment of tens of thousands of inmates who would not otherwise be placed in the maximum security category or in maximum security conditions.

Thus, in the end, respondent's suggested "solutions" are not really solutions at all. Instead, they illustrate just how far respondent (and the Tenth Circuit below) have to strain to justify invalidating the laudable Kansas SATP. Respondent

does not challenge the fact that acceptance of responsibility is a key component of managing a successful, rehabilitative, sex offender treatment program.

Nonetheless, respondent ultimately seeks "acceptance *without* responsibility," a result that our Constitution does not require.

CONCLUSION

Kansas respectfully requests that the Court reverse the decision of the Tenth Circuit, and hold that the acceptance of responsibility requirement of the Kansas sexual abuse treatment program is constitutional.

Respectfully submitted,

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September 2001